

EVIDENTIARY HEARING  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:

Application for Certification for )	Docket No.
the Tesla Power Plant Project )	01-AFC-21
_____)	

CALIFORNIA ENERGY COMMISSION  
MEETING HALL  
VFW POST #1537  
430 WEST GRANT LINE ROAD  
TRACY, CALIFORNIA

THURSDAY, SEPTEMBER 11, 2003

9:10 a.m.

Reported by  
James Ramos  
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

A P P E A R A N C E S

COMMITTEE MEMBERS PRESENT

Commissioner John L. Geesman, Presiding Member

HEARING OFFICER AND ADVISORS PRESENT

Susan Gefter, Hearing Officer

STAFF AND CONSULTANTS PRESENT

Darcie L. Houck, Esq., Staff Counsel  
Jack Caswell, Project Manager

STAFF WITNESSES

Eileen Allen, Land Use/Traffic and Transportation  
Unit  
Adolph Martinelli, Alameda County Community  
Development Agency  
Andrea Erichson

PUBLIC ADVISOR

Roberta Mendonca

APPLICANT

Scott Galati, Esq., Galati & Blek LLP

APPLICANT WITNESSES

Scott Busa, Project Director, FPL Energy  
Duane McCloud  
Dwight R. Mudry, Tetra Tech FW, Inc.

INTERVENORS

Robert (Bob) Sarvey, Community/Self  
Michael Boyd, CARE

INTERVENOR WITNESSES

Dick Schneider, Sierra Club  
Shawn Smallwood

A P P E A R A N C E S

PUBLIC COMMENT

Susan Sarvey, Clean Air for Citizens and Legal  
Equality

WATER DISTRICT WITNESSES

Martin Milobar, Buena Vista Water Storage District  
Dan W. Bartel, Buena Vista Water Storage District  
Hal Crossley, Rosedale-Rio Bravo Water Storage  
District  
Vincent D. Wong, Zone 7 Water Agency

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## P R O C E E D I N G S

9:10 a.m.

HEARING OFFICER GEFTER: This is the continuation of evidentiary hearings on the Tesla Power Project, sponsored by FPL Energy. We are about to continue our testimony on the topic of Traffic and Transportation.

At this point, I understand the Applicant has closed their testimony on this topic, and staff has a witness to discuss some of the proposed conditions that remained open. And I'll turn it over to staff, Ms. Hauck.

Oh, you know what, we can see the parties that are here, but the record can't see the parties. So why don't we do introductions very quickly, so we know who's present at this point. Mr. Galati?

MR. GALATI: Scott Galati on behalf of the Applicant. To my left is the Project Manager, Scott Busa. To my right is Dwight Mudry, who is the AFC Project Manager. And to the right of Dr. Mudry is Dwane McCloud, a Project Engineer.

We have various supporting cast of characters in the audience that I won't take the time to mention at this point, but you will be

1 hearing from them today.

2 HEARING OFFICER GEFTER: Thank you. And  
3 also Staff?

4 MS. HOUCK: Darcie Houck, counsel for  
5 the Energy Commission. To my left is Jack  
6 Caswell, the Project Manager. And to his left is  
7 Eileen Allen, she is staff's witness sponsoring  
8 the areas of traffic and transportation and land  
9 use.

10 We also have Rick York and Andrea  
11 Erichson, who will be sponsoring the biology  
12 testimony. And we have representatives from the  
13 county of Alameda as well.

14 HEARING OFFICER GEFTER: Thank you. Mr.  
15 Sarvey, as an Intervenor?

16 MR. SARVEY: Bob Sarvey.

17 HEARING OFFICER GEFTER: Also Mr. Boyd,  
18 who represents CARE as an Intervenor. He has not  
19 arrived yet this morning, but he does not have any  
20 question of cross-examination on the traffic  
21 topic, as I understand it. So we will proceed  
22 with Traffic. Ms. Houck?

23 MS. HOUCK: Yes. At this time I'd like  
24 to ask that the witness be sworn in.  
25 Whereupon,



1 EILEEN ALLEN  
2 was called as a witness herein, and after first  
3 having been duly sworn, was examined and testified  
4 as follows:

5 MS. HOUCK: Ms. Allen, please restate  
6 your name for the record?

7 MS. ALLEN: Eileen Allen.

8 MS. HOUCK: And was your statement of  
9 qualifications attached to the testimony submitted  
10 in exhibit 51, which is the final staff  
11 assessment?

12 MS. ALLEN: Yes it was.

13 MS. HOUCK: Could you briefly state your  
14 experience in regards to the subject matter?

15 MS. ALLEN: I've been a supervisor for  
16 the Energy Commission's Land Use and Traffic and  
17 Transportation Unit since February 2001. In  
18 addition to that I have personally prepared  
19 several traffic and transportation analyses.

20 MS. HOUCK: And did you prepare, or was  
21 the testimony submitted by staff as exhibit 51 and  
22 exhibit 53, which is the second addendum to the  
23 staff assessment, prepared by yourself or at your  
24 direction?

25 MS. ALLEN: At my direction.

1 MS. HOUCK: Do you have any changes to  
2 that written testimony? Actually, before we  
3 answer that question, staff submitted a traffic  
4 and transportation section in exhibit 51, the  
5 final staff assessment. And then there was  
6 another traffic and transportation section  
7 submitted in exhibit 53.

8 Is it your intent to replace the section  
9 in exhibit 51 with the one that was submitted with  
10 exhibit 53?

11 MS. ALLEN: Yes it is.

12 MS. HOUCK: With respect to exhibit 53,  
13 are you referring to appendix C?

14 MS. ALLEN: Yes.

15 MS. HOUCK: Do you have any changes to  
16 your testimony?

17 MS. ALLEN: Changes to exhibit 53?

18 MS. HOUCK: Appendix C, yes.

19 MS. ALLEN: As far as what we have  
20 submitted in writing, no, with the exception of  
21 accepting the Applicant's proposed changes that I  
22 became aware of yesterday.

23 MS. HOUCK: So you've reviewed the  
24 Applicant's rebuttal testimony with requested  
25 changes to the conditions of certification?

1 MS. ALLEN: Yes I did that yesterday  
2 afternoon.

3 MS. HOUCK: And staff accepts those  
4 amendments?

5 MS. ALLEN: Yes.

6 HEARING OFFICER GEFTER: Would you be  
7 more specific please?

8 MS. HOUCK: Okay. The Applicant had  
9 suggested changes to traffic and transportation  
10 condition trans 4.

11 Yesterday staff and Applicant -- well,  
12 first we had a discussion that overlapped with the  
13 hazardous material section, and it's my  
14 understanding that the parties stipulated that we  
15 would delete the portion of trans 4 associated  
16 with a specific route, and the hazardous materials  
17 staff would submit a new condition, hazardous  
18 materials 12, that would address hazardous  
19 materials transportation route.

20 So we would ask that portions of trans 4  
21 designating a route be deleted. Is that  
22 acceptable to staff?

23 MS. ALLEN: Yes it is.

24 MS. HOUCK: Okay. And the Applicant  
25 also had proposed amendments to trans 6. Can you

1 please state those amendments and what would be  
2 acceptable to staff?

3 MS. ALLEN: In the condition itself, in  
4 the sentence immediately following the heading  
5 "trans 6" there would be a deletion of the phrase  
6 "150" -- and the the word "foot" is left out --  
7 but it says "150 left turn lane for southbound  
8 traffic", that phrase would be deleted.

9 In order to be consistent, I am  
10 suggesting that that same phrase be deleted in the  
11 verification section also.

12 MS. HOUCK: Does staff have any other  
13 changes to the conditions of certification?

14 MS. ALLEN: Trans 1, the Applicant has  
15 suggested that the word "remote" be added to the  
16 bullet item. That suggestion is satisfactory.  
17 We've discussed the trans 4 --

18 HEARING OFFICER GEFTER: I'm sorry, Ms.  
19 Allen, can you restate that? With trans 1, which  
20 bullet are you referring to?

21 MS. ALLEN: Excuse me. There's a bullet  
22 which says, well the end of -- I apologize. The  
23 bullet is "schedule heavy equipment and building  
24 materials, deliveries, as well as the movement of  
25 materials and equipment from remote laydown areas

1 to occur during off-peak hours." The word  
2 "remote" has been added.

3 HEARING OFFICER GEFTER: What does that  
4 refer to, what do they mean by "remote?"

5 MS. ALLEN: Laydown areas that are  
6 removed from the site that are not immediately  
7 there in the 60 acre site.

8 HEARING OFFICER GEFTER: Well, why don't  
9 we actually say that, because "remote" is a very  
10 general term. I don't know what that means.

11 MS. ALLEN: So are you suggesting that  
12 we add language that would say "laydown areas  
13 apart from the site?"

14 HEARING OFFICER GEFTER: Removed from  
15 the site.

16 MS. HOUCK: And, could I have one second  
17 to ask --

18 HEARING OFFICER GEFTER: Off the record.  
19 (Off the record.)

20 HEARING OFFICER GEFTER: Back on the  
21 record.

22 MS. ALLEN: I can explain it. I'm  
23 sorry --

24 HEARING OFFICER GEFTER: You know what,  
25 let's go back to trans 1 first.

1 MS. ALLEN: Applicant's attorney has  
2 clarified the use of the term "remote." They have  
3 suggested, instead of the phrase "remove from the  
4 site" that they are looking for language along,  
5 language that would say "offsite and not adjacent  
6 to."

7 HEARING OFFICER GEFTER: That clears it  
8 up. Thank you. Okay, anything else on trans 1?

9 MS. ALLEN: No.

10 HEARING OFFICER GEFTER: All right. I  
11 have a question related to trans 7, where staff  
12 indicated that it would be revised to delete the  
13 phrase "150 foot left turn lane." Why is that?

14 MS. ALLEN: When this was called to my  
15 attention yesterday I got out the maps. After  
16 studying them I agreed that, if you are southbound  
17 on Midway Road, and you attempted to make a left  
18 turn, that would take you in the opposite  
19 direction of the site.

20 The site is on the right hand side of  
21 Midway Road, so if you were going southbound it  
22 would make no sense to turn left.

23 HEARING OFFICER GEFTER: All right. So  
24 the reference is only to the 150 foot left turn  
25 lane, it's not to a right turn deceleration lane?

1 MS. ALLEN: Right, excuse me, correct.

2 HEARING OFFICER GEFTER: Okay. And it's  
3 not to a left turn lane for northbound traffic.  
4 It's just one --

5 MS. ALLEN: If you would be going  
6 northbound on Midway, a left turn would be the way  
7 to get to the site.

8 HEARING OFFICER GEFTER: Would make  
9 sense. And with respect to this particular left  
10 turn lane, is this going to be a permanent left  
11 turn lane going northbound?

12 MS. ALLEN: Yes. And that's consistent  
13 with the wording here, "the project's owner shall  
14 fund and install a 150 foot left turn lane for  
15 northbound traffic."

16 HEARING OFFICER GEFTER: I think that if  
17 we add the word "permanent" -- because I think if  
18 we're talking about providing construction  
19 access -- because the second part of that  
20 condition talks about a 150 foot right turn  
21 deceleration lane that goes through the  
22 construction access intersection, and the ultimate  
23 driveway location.

24 And is the access intersection becoming  
25 the ultimate driveway location?

1 MS. ALLEN: I think the word "if" here  
2 is key.

3 HEARING OFFICER GEFTER: Where's "if?"

4 MS. ALLEN: "If" is at the beginning of  
5 that sentence.

6 HEARING OFFICER GEFTER: Oh, all right.

7 MS. ALLEN: "If the ultimate driveway  
8 location differs from the construction access  
9 intersection." This, --

10 HEARING OFFICER GEFTER: Let's go off  
11 the record.

12 (Off the record.)

13 HEARING OFFICER GEFTER: Back on the  
14 record. While we were off the record, the staff  
15 and the Applicant have agreed to meet in caucus to  
16 develop some appropriate language for the various  
17 conditions on traffic and transportation that  
18 remain vague and appear to be unenforceable.

19 So we would hope that, by the end of the  
20 day, we will get additional language for those  
21 conditions that would be acceptable for the  
22 Committee.

23 In the meantime, I understand that Mr.  
24 Galati has a cross-examination question for Ms.  
25 Allen on condition trans 6.



1           MR. GALATI: Ms. Allen, you talked about  
2 the Applicant's modifications to trans 6.  
3 Specifically you've highlighted the need for the  
4 deletion and the verification of reference to a  
5 southbound left turn lane, and you also agreed to  
6 the condition removing that same reference.

7           The Applicant had also proposed some  
8 modifications to the verification language that  
9 would allow construction of the roadway  
10 improvements to occur during and after  
11 mobilization of all the equipment to the site. Is  
12 that language also acceptable to staff?

13           MS. ALLEN: Yes it is.

14           HEARING OFFICER GEFTER: Well, Mr.  
15 Galati, when Ms. Allen meets with the Applicant  
16 this afternoon to draft some language, would you  
17 please include that language as well in trans 6?

18           MR. GALATI: Sure.

19           HEARING OFFICER GEFTER: At this point  
20 we are going to, again, leave the topic of traffic  
21 and transportation open, pending the offer of the  
22 revised conditions this afternoon. And we're  
23 going to move on the the topic of land use.

24           I also note that Mr. Boyd, representing  
25 CARE, and Intervenor in this case, is now present

1 at the hearing.

2 We'll ask Mr. Galati to begin with the  
3 topic of land use.

4 MR. GALATI: Ms. Gefter, Mr. Busa is my  
5 witness on land use, along with Dwight Mudry, who  
6 were both sworn yesterday. Would you like them  
7 re-sworn today?

8 HEARING OFFICER GEFTER: No, they're  
9 still sworn. We will assume that they will  
10 continue to be sworn.

11 MR. GALATI: Okay. Mr. Busa, are you  
12 familiar with exhibit 50, which is entitled "the  
13 testimony of Dwight Mudry and Scott Busa, land  
14 use," dated and docketed August 29th, 2003?

15 MR. BUSA: Yes I am.

16 MR. GALATI: Are you also familiar with  
17 staff's supplemental sponsored testimony, exhibit  
18 54, specifically in the area of land use?

19 MR. BUSA: Yes I am.

20 MR. GALATI: And in that section there  
21 is a proposed modification to condition of  
22 certification land 7?

23 HEARING OFFICER GEFTER: Could you  
24 please tell me what page it is in exhibit 54?

25 MR. GALATI: It is page 9 -- let me make

1 sure I'm referring to the right exhibit. This is  
2 staff's second addendum to staff's final staff  
3 assessment, which I believe is exhibit 54.  
4 Hopefully I'm referring to that correctly.

5 HEARING OFFICER GEFTER: I think that's  
6 53?

7 MR. GALATI: Oh, I apologize, I'm  
8 referring to exhibit 53, which is land use section  
9 page 9, the staff's second addendum.

10 MR. BUSA: Yes I'm familiar with that.

11 MR. GALATI: Do you agree with the  
12 changes to land 7, as proposed by staff on page 9?

13 MR. BUSA: Yes we agree with that.

14 MR. GALATI: And subsequently on page  
15 10?

16 MR. BUSA: Yes.

17 MR. GALATI: Other than that change to  
18 your testimony, do you have any additional changes  
19 to your testimony?

20 MR. BUSA: No I do not.

21 MR. GALATI: Ms. Gefter, in addition to  
22 exhibit 50, Mr. Busa and Dr. Mudry are sponsoring  
23 a portion of exhibit 1, specifically AFC section  
24 5.7, table 6.1-1, section 6.5.7, and appendix N; a  
25 portion of exhibit 2, specifically land use 1

1 through 9 responses, and PO 1; a portion of  
2 exhibit 3, specifically response numbers 94  
3 through 105; exhibit 16, exhibit 17, exhibit 18,  
4 19, 20, and 21.

5 At this time I'd ask for exhibit 50 and  
6 those portions of exhibits previously mentioned to  
7 be moved into the evidentiary record.

8 HEARING OFFICER GEFTER: Okay. Please,  
9 exhibit 18 -- what other ones did you list just  
10 now?

11 MR. GALATI: 16 through 21.

12 HEARING OFFICER GEFTER: 16 through 21.  
13 And let me ask staff, with respect to exhibits 16  
14 through 21, staff had included a series of letters  
15 that are in exhibit 53, are those letters the same  
16 as exhibits 16 through 21?

17 MS. HOUCK: I don't have the hard copies  
18 of the exhibits the Applicant submitted. I have  
19 the exhibit list. The dates don't seem to match  
20 up, though, on the letters.

21 HEARING OFFICER GEFTER: All right.  
22 Perhaps we can clear that up. Again, perhaps we  
23 can meet with the Applicant off the record and we  
24 can get the accurate dates and descriptions of  
25 these documents.

1 MS. HOUCK: 64F, though, would be the  
2 same resolution that the Applicant submitted as  
3 our exhibit. 64F, I believe, is the same as  
4 Applicant's exhibit 20. It has the same  
5 resolution number as --

6 HEARING OFFICER GEFTER: That's exhibit  
7 21.

8 MS. HOUCK: I mean 21, I apologize.  
9 Again, at this point we'll receive these exhibits  
10 into the record, but I would like the descriptions  
11 of these exhibits to be updated so that the dates  
12 are accurate. And perhaps staff and Applicant can  
13 meet on that to coordinate the exhibits.

14 Are there any objections to the exhibits  
15 proposed by Mr. Galati, with respect to the land  
16 use topic?

17 MR. SARVEY: Yes, I object to 64G --  
18 perhaps that's the staff's --

19 MS. HOUCK: That's the staff's exhibit,  
20 64G.

21 MR. SARVEY: Okay, all right.

22 HEARING OFFICER GEFTER: Do you have any  
23 objections to the exhibits listed by the  
24 Applicant?

25 MR. SARVEY: You guys listed that one?

1 No, no objection.

2 HEARING OFFICER GEFTER: Staff?

3 MS. HOUCK: No objections.

4 HEARING OFFICER GEFTER: All right. The  
5 exhibits listed by the Applicant, which include  
6 exhibit 50 and exhibit 16 through 21, and the  
7 other exhibits referred to by Mr. Galati related  
8 to the topic of land use are received into the  
9 record.

10 I am looking forward to receiving  
11 corrections with respect to some of the dates on  
12 these letters from the parties.

13 Mr. Galati, is the testimony of your  
14 witness complete?

15 MR. GALATI: That's correct.

16 HEARING OFFICER GEFTER: Staff?

17 MS. HOUCK: Staff has Eileen Allen, who  
18 was previously sworn in. We also have another  
19 witness from the county available to address  
20 issues pertaining to county laws, ordinances,  
21 regulations and standards. So I ask that that  
22 witness be sworn in at this time.

23 HEARING OFFICER GEFTER: You need to be  
24 sworn, so please raise your right hand.

25 Whereupon,

1 ADOLPH MARTINELLI  
2 was called as a witness herein, and after first  
3 having been duly sworn, was examined and testified  
4 as follows (along with Ms. Allen):

5 MS. HOUCK: Ms. Allen, did you prepare  
6 the testimony regarding land use set forth in  
7 staff's exhibit 51, the final staff assessment;  
8 staff's exhibit 52, the first addendum to the  
9 final staff assessment; and staff's exhibit 53,  
10 which is the second addendum to staff's final  
11 staff assessment?

12 MS. ALLEN: Yes I did.

13 MS. HOUCK: Do you have any changes to  
14 your testimony?

15 MS. ALLEN: No I do not.

16 MS. HOUCK: Is it your intent to replace  
17 the original condition land 7 with the condition  
18 set forth in staff's second addendum, exhibit 53?

19 MS. ALLEN: Yes it is.

20 MS. HOUCK: Are you familiar with a  
21 letter dated February 4th, 2002, that was sent to  
22 the county of Alameda and signed by Robert  
23 Haussler, listed as staff's exhibit 64A?

24 MS. ALLEN: Yes.

25 MS. HOUCK: And can you summarize what's

1 in that letter briefly?

2 MS. ALLEN: Under the direction of Mr.  
3 Haussler staff presented a number of questions to  
4 Alameda County's Community Development Agency  
5 staff regarding Alameda County's interpretation of  
6 its laws, ordinances regulations and standards  
7 related to the Tesla Power Project's consistency  
8 with those laws, ordinances, regulations and  
9 standards, particularly the consistency of the  
10 project with the East County Area Plan, and the  
11 Alameda County initiative, which was incorporated  
12 into that plan, called Measure D.

13 That was one section of the letter,  
14 headed "Ecap Policies." Another section of the  
15 letter dealt with the need for a Williamson Act  
16 contract cancellation, and whether the power plant  
17 would be of consistent use under the current  
18 Williamson Act contract. It was current at the  
19 time, as of February 4th '02. That summarizes the  
20 letter in brief.

21 MS. HOUCK: And did the county respond  
22 to this letter?

23 MS. ALLEN: Yes, the county responded on  
24 April 30th, 2002, and that letter is signed by Mr.  
25 Martinelli.



1 MS. HOUCK: Do you brief that this  
2 project is in compliance with all laws,  
3 ordinances, regulations and standards?

4 MS. ALLEN: Yes I do.

5 MS. HOUCK: Do you believe that there  
6 are any environmental impacts associated with land  
7 use from the proposed project?

8 MS. ALLEN: No unmitigated environmental  
9 impacts.

10 MS. HOUCK: Okay. And the opinions  
11 contained in your testimony represent your best  
12 professional judgment?

13 MS. ALLEN: Yes they do.

14 MS. HOUCK: Is it staff's understanding  
15 that there was an issue raised at the prehearing  
16 conference regarding the appendix to exhibit 51,  
17 land use, regarding consistency findings, that the  
18 county would make if they were going to issue a  
19 permit for this project?

20 MS. ALLEN: Yes, that issue was raised.

21 MS. HOUCK: In response to that concern,  
22 did staff ask for clarification from the county as  
23 to this particular project, regarding what  
24 findings they would make if they were to issue a  
25 conditional use permit?

1 MS. ALLEN: Yes, and we received that  
2 clarification from the county in a letter that's  
3 dated September 3rd, 2003.

4 MS. HOUCK: And is that letter staff's  
5 exhibit 64G?

6 MS. ALLEN: Yes it is.

7 MS. HOUCK: Thank you. I would ask that  
8 the witness for the county please state your name  
9 for the record.

10 MR. MARTINELLI: I'm Adolph Martinelli.

11 MS. HOUCK: Can you state your  
12 qualifications and experience in regards to land  
13 use?

14 MR. MARTINELLI: Yes. I served as  
15 Director of the Alameda County Community  
16 Development Agency from 1996 to July of this year.  
17 During that period I also held positions of  
18 Manager of Surplus Property Authority, and  
19 Executive Director of the Alameda County  
20 Redevelopment Agency, since its formation.

21 Prior to that time I served as Planning  
22 Director, from 1990, Chief of Development Planning  
23 for Alameda County, since 1984. I have 38 years  
24 of professional planning experience.

25 MS. HOUCK: Are you familiar with an

1 April 30th, 2002 letter addressed to Bob Haussler  
2 from the County of Alameda?

3 MR. MARTINELLI: Yes. I signed the  
4 letter, it was a response to the land use  
5 questions proposed by Mr. Haussler.

6 HEARING OFFICER GEFTER: Is this exhibit  
7 number 64B?

8 MS. HOUCK: Yes, it's exhibit number  
9 64B. And does that letter reflect the county's  
10 position with regards to Alameda County laws,  
11 ordinances, regulations and standards?

12 MR. MARTINELLI: Yes.

13 MS. HOUCK: Are you familiar with a  
14 letter dated May 20th, 2002 marked "staff exhibit  
15 64C", that is addressed to yourself, Mr.  
16 Martinelli, and submitted and signed by Mr.  
17 Galati, regarding a request for a Williamson Act  
18 decision and creation of agricultural conservation  
19 easement parcel number 099B-7825-001-004 and  
20 parcel number 099b-7825-1-3?

21 MR. MARTINELLI: Yes.

22 HEARING OFFICER GEFTER: Off the record.  
23 (Off the record.)

24 HEARING OFFICER GEFTER: Back on the  
25 record.

1 MS. HOUCK: And does that letter  
2 represent an official request by the Applicant for  
3 a cancellation of the Williamson Act parcel?

4 MR. MARTINELLI: It does.

5 MR. GALATI: Ms. Gefter, if I could, I  
6 think it's important that I try some clarification  
7 now. I now understand why the dates are different  
8 between these two exhibits.

9 HEARING OFFICER GEFTER: Between which  
10 two exhibits?

11 MR. GALATI: Between what looks to be  
12 exhibit 64C, which is a letter from myself to Mr.  
13 Martinelli, and Applicant's exhibit 16. If it  
14 would be appropriate, can I explain the  
15 difference?

16 HEARING OFFICER GEFTER: Yes.

17 MS. HOUCK: We also have the July 30th  
18 letter as well.

19 MR. GALATI: Okay, because the letter  
20 we're talking about now asks for a rescission,  
21 that was then modified to ask for a partial  
22 cancellation. 16 is the partial cancellation. It  
23 dawned on me why the dates are different.

24 HEARING OFFICER GEFTER: Yes. And that  
25 was confusing to me, too, and then when you see

1     that exhibit 16 refers to partial cancellation --.  
2     is this letter then relevant, this 64C?

3             MS. HOUCK:  No.  At this time it's not.  
4     It was our understanding that the Committee did  
5     want all documents that were filed with the court  
6     attached as exhibits.

7             HEARING OFFICER GEFTER:  The only thing  
8     here with respect to exhibit 64C, which then was  
9     superseded by exhibit 16, is that there is a  
10    difference between a request for a rescission and  
11    a request for partial cancellation.  That's my  
12    understanding.  And if Applicant wants to explain  
13    to us what happened real quickly, that would be  
14    helpful for the record.

15            MR. GALATI:  We were trying to  
16    accomplish having the Williamson Act either  
17    rescinded or canceled, and setting up an  
18    agricultural conservation easement that would be  
19    appropriate for the county to manage on the  
20    adjacent property.

21            When we first asked for a partial  
22    rescission and agricultural conservation easement  
23    it created a long process with the Department of  
24    Conservation, that would not be able to accomplish  
25    our goals in the amount of time.

1           We subsequently found out that we could,  
2   by partially canceling, the only downside to the  
3   Applicant would be that there would be an  
4   additional payment of funds as the penalty, but  
5   would not have to go through the agricultural  
6   conservation easement approval process through the  
7   Department of Conservation.

8           So it still accomplished our goals, our  
9   intent. And unfortunately, I had filed the wrong  
10   request first.

11           HEARING OFFICER GEFTER: Okay. So what  
12   we are looking at now is a request for a partial  
13   cancellation, correct?

14           MR. GALATI: That's correct.

15           HEARING OFFICER GEFTER: And what I  
16   understand is that the Applicant, even though  
17   under a partial cancellation, is not required to  
18   create an agricultural conservation easement.  
19   That you are going to do that in the event?

20           MR. GALATI: That's correct. It's a  
21   condition of the resolution. It was in our  
22   application, the commitment to do so, and staff  
23   has now made that a commitment in land 7, which  
24   we've agreed to.

25           HEARING OFFICER GEFTER: So with respect

1 to exhibit 64C, it has been identified and  
2 discussed. It's no longer pertinent to this  
3 project. However, since we have talked about it,  
4 we probably need to have it as part of the record.

5 MS. HOUCK: And just for clarification,  
6 does Applicant's exhibit 16 also include the  
7 letter from the landowners authorizing the partial  
8 cancellation?

9 MR. GALATI: I don't believe that it  
10 does, and you have that separately --

11 MS. HOUCK: Yes.

12 MR. GALATI: -- identified. We should  
13 continue to separately identify that.

14 MS. HOUCK: Okay. Mr. Martinelli, are  
15 you familiar with Applicant's exhibit 16, the  
16 letter dated July 30th, 2002, that we just  
17 discussed?

18 MR. MARTINELLI: Yes. I was party to  
19 the discussion of the decision of rescission  
20 versus cancellation, both with the Department of  
21 conservation and with the Applicant. And the  
22 request for cancellation is the request that was  
23 processed, and it superseded the other.

24 MS. HOUCK: Are you familiar with a  
25 letter addressed to Patricia Gatz at the

1 Department of Conservation that was signed by G.  
2 Archer Bakerink, from the property owners,  
3 regarding this partial cancellation?

4 HEARING OFFICER GEFTER: This is exhibit  
5 64?

6 MS. HOUCK: This is exhibit 64.

7 MR. MARTINELLI: Yes. That's the  
8 landowners indication that they've filed for non-  
9 renewal.

10 MS. HOUCK: Yes.

11 MR. MARTINELLI: Yes.

12 HEARING OFFICER GEFTER: 64E.

13 MS. HOUCK: 64E. And are you familiar  
14 with Alameda County resolution R-2003-322, which  
15 is marked as exhibit 64F? And I believe it's  
16 Applicant's exhibit 21, so we would not need to  
17 have ours addressed, since it's been already  
18 introduced by the Applicant.

19 MR. MARTINELLI: Yes.

20 MS. HOUCK: And then are you familiar  
21 with the Alameda County Development Agency letter  
22 dated September 3rd, marked as exhibit 64G, that  
23 was recently sent to the Commission?

24 MR. MARTINELLI: I'm aware of it, yes.

25 MS. HOUCK: And again, the staff has



1 provided the county representative to address  
2 concerns for the purposes of cross-examination.

3 So at this time we would ask that the  
4 portions of exhibit 51 relating to land use that  
5 were identified earlier, which is section 4.5; and  
6 the land use sections of staff's exhibit 52, which  
7 is section 2.5; the land use portions of exhibit  
8 53, which are pages -- actually the land use  
9 portions of exhibit 53 were attachments that were  
10 included in our exhibit, so at this time we would  
11 ask that those exhibits, along with exhibit 64A,  
12 64B, and 64E, and 64G be admitted into evidence.

13 HEARING OFFICER GEFTER: And 64C and D?

14 MS. HOUCK: 64C, I believe, is  
15 Applicant's exhibit 16.

16 HEARING OFFICER GEFTER: Well, no it's  
17 not. We just talked about that. 64C talks about  
18 the original request for rescission, and because  
19 we talked about it already we will receive it into  
20 the record, it just is no longer pertinent as to  
21 our findings.

22 MS. HOUCK: Exhibit 16 is the same as  
23 our 64D.

24 HEARING OFFICER GEFTER: No, 64D is a  
25 cover letter. We don't need 64D.

1 MS. HOUCK: Okay.

2 HEARING OFFICER GEFTER: Apparently,  
3 staff did not offer a copy of exhibit 16. That's  
4 what I understand.

5 MR. GALATI: I think it's identified as  
6 the cover letter, but it is attached.

7 MS. HOUCK: It is attached to the cover  
8 letter in our exhibit.

9 HEARING OFFICER GEFTER: Oh, I see. So  
10 you don't need that?

11 MS. HOUCK: No, it's in Applicant's  
12 exhibit 16.

13 MS. HOUCK: And then our exhibit 64F is  
14 the same as Applicant's exhibit 21.

15 HEARING OFFICER GEFTER: Right. Thank  
16 you. So what you're moving into the record now is  
17 portions of exhibits 51, 52, and 53 related to  
18 land use, and those particular items identified as  
19 64A, 64B, 64C, 64E, and 64G?

20 MS. HOUCK: Yes.

21 HEARING OFFICER GEFTER: Any objections?

22 MR. SARVEY: We object to 64G.

23 MR. GALATI: No objection.

24 MS. HOUCK: And staff has just indicated  
25 that 64G was in response to the confusion between

1 the attachment in 51 that had East Altamont listed  
2 at the top, and we wanted clarification from the  
3 county as to whether they would find this project  
4 consistent if they had jurisdiction to issue the  
5 conditional use permit. And those findings are  
6 attached to the September 3rd letter.

7 HEARING OFFICER GEFTER: Okay. Mr.  
8 Sarvey, what is the basis for your objection to  
9 64G?

10 MR. SARVEY: There's several bases.  
11 Number one, I'm still confused on what the purpose  
12 of that exhibit is. Number two -- and I couldn't  
13 follow that conversation we just had, I'm sorry.  
14 It was a little more complicated than -- so maybe  
15 we can get a little more conversation on that.

16 Number two, August 29th was the filing  
17 for testimony and exhibits, and this has come in  
18 after the date. So we don't feel like we've been  
19 afforded enough time to look at this exhibit.

20 HEARING OFFICER GEFTER: All right.  
21 This was filed before September 5th, which was the  
22 date for rebuttal testimony. It also was  
23 requested by the Committee because we needed  
24 clarification as to what the county would have  
25 required in terms of conditional use permits had

1     they been the jurisdictional agency.

2             And we always want to see that in every  
3     case with respect to any kind of conditional use  
4     permit required of a local permitting agency,  
5     since the Energy Commission has jurisdiction of  
6     these issues in the context of a siting case.  Ms.  
7     Houck?

8             MS. HOUCK:  Yes.  And just to clarify  
9     for Mr. Sarvey, the confusion I believe was the  
10    result of -- in exhibit 51, the land use section,  
11    page 4.5-26 has an appendix A and the county had  
12    indicated that, because the project's were so  
13    similar, that they would find them both  
14    consistent.

15            And we had a copy of something that had  
16    East Altamont's Energy Center in its title.  And  
17    there needed to be clarification, and this letter  
18    was intended to address that.

19            HEARING OFFICER GEFTER:  I'd also ask  
20    Mr. Martinelli, you indicated, when Ms. Houck  
21    asked you if you were familiar with exhibit 64G,  
22    and you said you know about it.  Was this a letter  
23    that was prepared under your supervision, or do  
24    you have any agreement or disagreement with it?

25            MR. MARTINELLI:  I have no disagreement

1 with it. Under my supervision we prepared a  
2 document which consisted of theoretical findings  
3 necessary to grant a conditional use permit on  
4 East Altamont Energy Center, based on a request  
5 from your staff.

6 We felt those findings would also be  
7 applicable for this. The clarification in this  
8 subsequent letter is merely staging the changing  
9 of the reference at the top of the letter.  
10 There's no change in the substance of the finding.  
11 So I am familiar with it.

12 HEARING OFFICER GEFTER: Okay, Mr.  
13 Sarvey, your question is?

14 MR. SARVEY: My question is, number one,  
15 is Mr. Martinelli going to testify to all the  
16 facts and any questions we have about this  
17 letter -- and we'd like to have a copy and 15  
18 minutes to take a look at it, since it was entered  
19 in late.

20 HEARING OFFICER GEFTER: Well, it wasn't  
21 entered in late, it was filed with the Applicant's  
22 exhibit -- is this part of exhibit 53, Ms.  
23 Houck? -- and they have been broken out into  
24 exhibits.

25 Actually, a more specific question was,

1     when staff filed your list of exhibits and copies  
2     of exhibits, were these exhibits then also sent to  
3     the Intervenor, or at least the list sent?

4             MS. HOUCK: This item was in the docket  
5     unit, and it should have been served on all  
6     parties. It was not specifically attached to our  
7     exhibit. It was included in our exhibit list, but  
8     was docketed and should have been served on all  
9     parties.

10            The language is almost identical to that  
11     in appendix A of 4.5-26.

12            HEARING OFFICER GEFTER: So, Mr. Sarvey,  
13     you may cross-examination the witness on this  
14     document, if you wish.

15            MR. SARVEY: Can I be provided a copy of  
16     it?

17            HEARING OFFICER GEFTER: I don't have a  
18     copy, do you have an extra copy, Ms. Houck?

19            MS. HOUCK: No.

20            HEARING OFFICER GEFTER: I have a copy  
21     right here. Why don't you look at this and ask  
22     your questions, and then return it to me, and  
23     we'll get you your own copy. Okay, off the  
24     record.

25     (Off the record.)

1           HEARING OFFICER GEFTER: Back on the  
2 record. Mr. Sarvey, do you have questions?

3           MR. SARVEY: Yes. Who am I cross-  
4 examining?

5           HEARING OFFICER GEFTER: You may ask Ms.  
6 Allen or Mr. Martinelli.

7           MR. SARVEY: But it's just about this  
8 document?

9           HEARING OFFICER GEFTER: For right now,  
10 just the document.

11          MR. SARVEY: Okay. I'm okay with this  
12 document, but I'd like to cross-examine when we --

13          HEARING OFFICER GEFTER: You need to  
14 speak into the microphone.

15          MR. SARVEY: I remove my objection, now  
16 that I've seen the document.

17          HEARING OFFICER GEFTER: Okay. Before  
18 you then cross-examine on other issues related to  
19 land use we're going to receive into the record  
20 the exhibits that staff has offered, and those  
21 exhibits are now in the record. Mr. Boyd?

22          MR. BOYD: I also objected, and I  
23 haven't removed my objection yet, because I don't  
24 know what's going on with this 64G exhibit,  
25 frankly.

1           HEARING OFFICER GEFTER: What is it that  
2   you don't understand?

3           MR. BOYD: It seems like, the  
4   description here, the description I heard was that  
5   you were, that its tentative findings relating to  
6   a hypothetical conditional use permit. And I  
7   quite frankly don't understand what the purpose of  
8   a hypothetical conditional use permit is.

9           It seems kind of speculative at best.  
10   As you said earlier --

11          HEARING OFFICER GEFTER: Okay, Mr.  
12   Boyd --

13          MR. BOYD: -- the Commission has --

14          HEARING OFFICER GEFTER: Wait a minute,  
15   Mr. Boyd, let me answer your question. You've  
16   participated in several Energy Commission  
17   hearings, and this occurs in every case, because  
18   the Energy Commission has overall jurisdictional  
19   siting authority, so that the local land use  
20   jurisdiction, which is typically a county or a  
21   city, would have imposed certain conditions for a  
22   conditional use permit.

23          Since we supersede those agencies, we  
24   typically include the conditions they would have  
25   imposed had they been the jurisdictional agency,



1 and what we asked the Alameda County Development  
2 Agency to do is to provide is with the conditions  
3 that they would have ordinarily imposed on this  
4 project had they had jurisdiction over this  
5 project.

6 And that's what these tentative findings  
7 are. And the staff has incorporated these  
8 conditions into its proposed conditions of  
9 certification for the project.

10 MR. BOYD: So, what you're saying then -  
11 - just to repeat -- is they would have, if they  
12 would have done that, if this was their project  
13 and they had issued a conditional use permit,  
14 those conditions would have been based on  
15 mitigation measures for -- they're a CEQA agency,  
16 basically.

17 And they would have had to do their own  
18 environmental review on their project before they  
19 issued that conditional use permit. So the  
20 question that I have is, basically, you guys, the  
21 Energy Commission, has a duty to carry out the  
22 CEQA review, and this is trying to put the cart  
23 before the horse, you know what I'm trying to  
24 say --

25 HEARING OFFICER GEFTER: No, Mr. Boyd --

1 MR. BOYD: -- because what I'm seeing --

2 HEARING OFFICER GEFTER: Mr. Boyd, wait  
3 a minute.

4 MR. BOYD: Okay, go ahead.

5 HEARING OFFICER GEFTER: You are  
6 mischaracterizing the law. We're talking about  
7 compliance with LORS, we're not talking about a  
8 CEQA analysis here.

9 MR. BOYD: Oh, I understand, but what  
10 conditions based on --

11 HEARING OFFICER GEFTER: Excuse me, let  
12 me finish speaking. The conditions are not based  
13 on CEQA, the conditions are based on whether the  
14 project would comply with local LORS, and that's  
15 what we asked the local agency to provide us with,  
16 is whether or not the project would comply with  
17 local LORS, if in fact the local agency had  
18 jurisdiction.

19 Okay, we're going to move on now --

20 MR. BOYD: And then also -- one more  
21 question, and then I'll stop.

22 HEARING OFFICER GEFTER: All right.

23 MR. BOYD: You also said that the main  
24 difference was that it had originally mentioned  
25 East Altamont Energy Center on the top, and that

1     there was a change to make it reflect that it was  
2     the Tesla Project.  And basically, it was the same  
3     findings as the East Altamont Energy Center.

4             My concern with that is that there is a  
5     Williamson Act involved with this, which is a LORS  
6     that's different between East Altamont.  And my  
7     concern is that that isn't addressed in the  
8     conditional use permit, and therefore that's why I  
9     continue to object to that exhibit.

10            HEARING OFFICER GEFTER:  Okay.  Mr.  
11     Martinelli, do you have a comment?

12            MR. MARTINELLI:  Yes.  One of the  
13     changes to make the September submittal consistent  
14     with this application was to reference the  
15     necessity for the Williamson Act to cancellation  
16     and that the board had acted on that.  It also  
17     made some changes to the locational references  
18     within the document.

19            It was responding to the mandatory  
20     findings that are required to grant the additional  
21     use permit.  It was theoretical in that it was not  
22     in the context of public hearings or CEQA  
23     analysis.

24            So, you know, for whatever value it has,  
25     it was a staff opinion based on the information

1 before us on whether we could make these findings  
2 or not, but it would not be the complete due  
3 process that you have to go through.

4 MR. BOYD: It's precisely for that  
5 reason that I object. Which is, I don't feel like  
6 there's due process, that citizens of Alameda  
7 County have had a fair opportunity to be heard on  
8 this matter before the county of Alameda.

9 HEARING OFFICER GEFTER: All right. Mr.  
10 Boyd, I believe you're basically challenging the  
11 statutory program under which we're operating, so  
12 your objection is overruled, and the exhibit is  
13 accepted into the record. And now we're going to  
14 go off the record again.

15 (Off the record.)

16 HEARING OFFICER GEFTER: Back on the  
17 record. Mr. Sarvey has requested to cross-examine  
18 both the Applicant's and staff's witnesses on the  
19 subject of land use. Mr. Sarvey, you may begin.

20 MR. SARVEY: Okay. Ms. Allen, good day.  
21 Does the staff typically consider a power plant  
22 with its noise emissions and traffic compatible  
23 with the biological preserve?

24 MS. HOUCK: Objection. I believe that  
25 question's more an issue for biological resources.

1 If he's asking that if this is in violation of a  
2 particular law, ordinance, regulation or standard,  
3 a local standard or law, that would be one thing.  
4 But I'd want to know what specifically --

5 MR. SARVEY: Well, staff testified in  
6 the FSA that the project's compatible with  
7 existing land uses, and Haera Mitigation Bank  
8 that's adjacent to it. It's a biological reserve,  
9 and I'm asking her is the power plant consistent  
10 with that use?

11 MS. HOUCK: I would still object. When  
12 staff's talking about local consistency measures  
13 they're talking about local zoning, etc., and  
14 incompatible uses in regards to how the county  
15 zoned the property.

16 HEARING OFFICER GEFTER: The objection  
17 is sustained. Please move on.

18 MR. SARVEY: You state in your  
19 conclusions in the FSA that the current  
20 development pattern for the area established by  
21 the Ecap, amended by Measure D, is unclear.  
22 Without the County of Alameda's testimony, what  
23 would be your professional interpretation of  
24 Measure D and its applicability to the Ecap?

25 MR. GALATI: At this time I would like

1 to enter an objection just based on this grounds  
2 -- and it needs some guidance from the committee  
3 because I believe that this is a legal decision.  
4 And if I may, and I apologize for speaking, but  
5 the local land use agency has made and will make  
6 findings that are within its jurisdiction.

7 My understanding is the findings related  
8 to the Williamson Act, for example, are within its  
9 jurisdiction, and that the Energy Commission does  
10 not cancel Williamson Act contracts, nor does the  
11 Energy Commission give an opinion of whether such  
12 actions should have been granted.

13 I'm asking for a narrowing scope of the  
14 cross-examination to those things which are in the  
15 Energy Commission's jurisdiction, such as  
16 compatibility with local LORS, when the local  
17 agency is here, or when we have a resolution  
18 canceling the Williamson Act, I believe that those  
19 things are not necessary, or should staff be  
20 opining as to whether the county should have done  
21 what it did.

22 MS. HOUCK: I would also object as  
23 speculation, as staff does not interpret  
24 compatibility with local land use LORS in a  
25 vacuum, and they would need to have input from the

1 local entity in making their conclusions.

2 So I think it would call for speculation  
3 as to whether staff would have had a different  
4 opinion if this were in a different county of  
5 Alameda County didn't have local LORS.

6 I would also just indicate that, as to  
7 the Williamson Act contract, regarding Mr.  
8 Galati's comments, the Commission in this case did  
9 not have to address the compatibility issue  
10 regarding the Williamson Act as the county did in  
11 fact issue the tentative cancellation. Whether  
12 this Commission is able to cancel Williamson Act  
13 contracts or not is not an issue before the  
14 Commission at this time.

15 HEARING OFFICER GEFTER: I never thought  
16 that the Commission, you know, had jurisdiction  
17 over the cancellation of the Williamson Act  
18 contract, Ms. Houck, so I think the way Mr. Galati  
19 characterized it is accurate. And I also am going  
20 to sustain both of your objections to the line of  
21 questioning.

22 Basically what staff looks at, as Ms.  
23 Houck indicated with respect to the land use, is  
24 compatibility with local land use LORS as well as  
25 consistency with those LORS. That's the inquiry

1     that staff undertakes in the land use topic.  And  
2     so I would ask that you limit your questions to  
3     those areas.

4             MR. SARVEY:  I just want to note for the  
5     record that I've asked two questions on land use,  
6     and neither one has been answered.  And I believe  
7     we're here to answer the questions, to get down to  
8     the matter of whether this project is certifiable,  
9     and I object to this legal maneuvering around the  
10    questions that I'm asking.  Thank you.

11            Is this power plant in urban use?

12            MS. ALLEN:  Our testimony states that  
13    power plants fall into the unusual category that  
14    can be considered part of essential services.  
15    Electricity services are provided in both rural  
16    and urban areas with chain link, so the concept of  
17    infrastructure is applicable and reasonable here,  
18    and I regard it as a reasonable part of a rural  
19    area.

20            MR. SARVEY:  Okay.  So, in East Altamont  
21    Energy Center staff testified that East Altamont  
22    Energy Center was urban use, and now they've  
23    changed their statement, is that correct?

24            MS. ALLEN:  I would have to review my  
25    testimony for East Altamont, and take a look at



1     that in the context of your question.

2             MR. SARVEY:   Mr. Martinelli, it's good  
3     to see you again.   In order for the county to  
4     establish a partial cancellation on this property,  
5     they had to make a finding that the partial  
6     cancellation would not result in removal of  
7     adjacent land from agricultural use in the land  
8     surrounding the property for which the contract is  
9     to be partially canceled.   Is that correct?

10            MR. MARTINELLI:   Yes.

11            MR. SARVEY:   Now, are you aware that the  
12    Applicant is proposing to use the adjacent land as  
13    a biological reserve and remove it permanently  
14    from agricultural use?

15            MR. GALATI:   I would object to that.  
16    That is an improper characterization of the  
17    mitigation plan.   As stated in land 7, and as  
18    stated in the conditions of the Williamson Act  
19    contract, the 100 acres is to be used for, to have  
20    a permanent agricultural conservation easement.

21            Whether that also has a biological  
22    resource benefit can be discussed in biological  
23    resources, but there will be an agricultural  
24    conservation easement on that 100 acres adjacent  
25    to the property.

1           MR. MARTINELLI: They are not mutually  
2 exclusive from the county's position. Biological  
3 habitat and resources and agriculture can be  
4 compatible. In fact, weighing on many of the  
5 decision on whether you have cultivated  
6 agriculture or whether you have grading and non-  
7 intrusive agriculture.

8           MR. SARVEY: Okay. I just want to ask  
9 you one more time, because maybe everybody's  
10 unclear on this. In order to make a finding for  
11 the Williamson Act a partial cancellation, you  
12 have to make a finding that will not result in the  
13 removal of adjacent land from agriculture use, the  
14 land surrounding the property, is that correct?

15          MR. MARTINELLI: Right. I might add, it  
16 has a phrase in that a qualifier that it's not  
17 likely to result, and it's not an absolute.

18          MR. SARVEY: Do you have an estimate of  
19 how much energy is used in eastern Alameda County?

20          MR. MARTINELLI: No.

21          MR. SARVEY: Have you read Measure D,  
22 are you familiar with it?

23          MR. MARTINELLI: Yes.

24          MR. SARVEY: Measure D states, under --  
25 it's now policy 13 --

1 HEARING OFFICER GEFTER: Okay, is that  
2 an exhibit?

3 MR. SARVEY: Yes it is.

4 HEARING OFFICER GEFTER: Can you tell us  
5 what exhibit it is?

6 MR. GALATI: Ms. Gefter, I also object  
7 to this line of questioning for the following  
8 reasons, and why this case is different than East  
9 Altamont. In East Altamont it was an opinion of  
10 Mr. Martinelli and Alameda County staff of whether  
11 or not this project complied with Measure D.

12 In this case we have a board resolution  
13 and finding by the board of supervisors that the  
14 project does in fact comply with Measure D. And  
15 for that reason, asking Mr. Martinelli what his  
16 opinion is, or cross-examining him, would be  
17 irrelevant to this case. The resolution speaks  
18 for itself.

19 HEARING OFFICER GEFTER: Okay, and would  
20 you tell me what exhibit that is?

21 MR. GALATI: That is exhibit 21.

22 HEARING OFFICER GEFTER: And Mr.  
23 Galati's objection is sustained. You can ask  
24 another question.

25 MR. SARVEY: Mr. Martinelli, did you

1 develop the findings that the board supervisors  
2 use for the aforementioned document that we were  
3 just speaking of?

4 HEARING OFFICER GEFTER: Which  
5 document -- Measure D or the resolution?

6 MR. SARVEY: The finding that Measure D  
7 is compatible with --

8 HEARING OFFICER GEFTER: So that's  
9 exhibit 21.

10 MR. SARVEY: Exhibit 21. Did you  
11 provide those findings?

12 MR. MARTINELLI: They were developed  
13 under my supervision by staff.

14 MR. SARVEY: And you advised the board  
15 on it, correct?

16 MR. MARTINELLI: Yes.

17 MR. SARVEY: Okay, I believe that that  
18 objection is not sustainable under those  
19 circumstances. He developed the findings.

20 HEARING OFFICER GEFTER: Measure D is  
21 found in exhibit 75A, which is in Intervenor  
22 Sarvey's exhibit. And the objection has already  
23 been sustained. You can ask Mr. Martinelli  
24 another question.

25 MR. SARVEY: Well, what can I ask him if

1 I can't ask him about Measure D, I can't ask  
2 about --

3 HEARING OFFICER GEFTER: I didn't say  
4 you couldn't ask about Measure D. You asked him  
5 whether he thought that the project was  
6 incompatible with Measure D, and the county has  
7 already issued a resolution finding compatibility.  
8 You can ask him any other question.

9 MR. SARVEY: I didn't ask that.

10 MR. BOYD: He asked him something he was  
11 starting to read out of the --

12 MR. SARVEY: I was starting to read  
13 something out of the policy. I never asked him if  
14 it was compatible with Measure D. I don't  
15 understand the objection, to be honest with you.

16 HEARING OFFICER GEFTER: Okay. Ask your  
17 question.

18 MR. SARVEY: Okay. Policy 13, "the  
19 county shall not provide unauthorized public  
20 facilities or infrastructure in excess of that  
21 needed for permissible development consistent with  
22 the initiative. This policy shall not bar new,  
23 expanded, or replacement infrastructure necessary  
24 to create adequate service for east county."

25 Now, in that phrase, does it say county

1 of Alameda or does it say east county?

2 MR. MARTINELLI: That portion of that  
3 policy says east county, but you didn't read the  
4 entire policy.

5 MR. SARVEY: It says east county, okay.  
6 Does it say east county or northern California?

7 MR. MARTINELLI: That portion -- if you  
8 go on to read the rest of the policy you will see  
9 that it also says infrastructure such as  
10 pipelines, canals, power transmission lines which  
11 have no excessive growth-inducing effect on the  
12 east county, but would have permit conditions that  
13 could ensure that no service can be provided  
14 beyond that consistent with development allowed by  
15 the initiative.

16 It doesn't limit it to east county. In  
17 fact, the county has, since Measure D, considered  
18 expanding the aqueducts for the area, which would  
19 serve Contra Costa County. And there's a gas,  
20 Chevroline (sp) gas line going through the area  
21 which serves San Jose Airport. There aren't  
22 limitations to the geography if you read the  
23 entire policy 13.

24 And it goes on to say that  
25 infrastructure shall include public facilities and

1 all structures and development necessary to the  
2 provision of public services and utilities.  
3 Within that context, which is very broad, the  
4 county has concluded that consideration of a power  
5 plant is within the discretion of the board of  
6 supervisors, or in this case the discretion of the  
7 Energy Commission.

8 MR. SARVEY: And in that determination  
9 did you use the permit conditions of Alameda  
10 County to make that determination?

11 MR. MARTINELLI: I don't understand. We  
12 didn't act on a permit.

13 MR. SARVEY: Did the county find that  
14 these permit conditions were met?

15 MR. MARTINELLI: The county, in acting  
16 on the Williamson Act cancellation, the board of  
17 supervisors adopted a resolution indicating that  
18 the power plant would be consistent with the  
19 restrictions of Measure D.

20 MR. SARVEY: And has the county of  
21 Alameda made a determination as to how much energy  
22 the county of Alameda will need in the future?

23 MR. MARTINELLI: No.

24 MR. SARVEY: Do you know how many homes  
25 an 1,100 megawatt power plant will serve?

1 MS. HOUCK: Objection, irrelevant.

2 HEARING OFFICER GEFTER: Objection  
3 sustained.

4 MR. SARVEY: Have you seen the  
5 resolution passed by the Sierra Club opposing this  
6 project?

7 HEARING OFFICER GEFTER: Would you  
8 identify that as an exhibit please? Is that  
9 exhibit 74A?

10 MR. SARVEY: Yes it is.

11 MR. MARTINELLI: I glanced at it just  
12 this morning.

13 MR. SARVEY: And did the Sierra Club  
14 sponsor Measure D?

15 MR. MARTINELLI: They were one of the  
16 sponsors, yes.

17 MR. SARVEY: Did members of the Sierra  
18 Club draft measure D?

19 MR. MARTINELLI: I'm not sure who all of  
20 the drafters were, but I know Mr. Schneider, who  
21 has, was one of the principle members of it.

22 MR. SARVEY: And he is a member of  
23 Sierra Club, correct?

24 MR. MARTINELLI: That's correct.

25 MR. SARVEY: Now, looking at this



1 resolution, does it look like the sponsors and  
2 drafters of Measure D approve of this project, and  
3 think that it's compatible with Measure D?

4 MS. HOUCK: That question is asking for  
5 speculation and opinion of this witness. He  
6 doesn't have a personal opinion, so the question  
7 is inappropriate.

8 MR. MARTINELLI: I might add that  
9 Measure D modified a portion of the East County  
10 Area Plan, but the entire general plan document is  
11 a document which was updated and adopted by the  
12 board of supervisors in February of 2002, which  
13 reflects modifications of Measure D.

14 But Measure D is not the only substance  
15 to the general plan. There's substantial  
16 additional text and maps and material that are a  
17 part of the general county policy.

18 MR. SARVEY: Does Measure D provide an  
19 infrastructure exemption for a statewide need?

20 MR. MARTINELLI: There are exemptions.  
21 There is an exemption under policy, now policy 13,  
22 for infrastructure. It's not an exemption, it's a  
23 clarification.

24 MR. SARVEY: What other public services  
25 are allowed by Measure D's infrastructure

1 exemption?

2 MS. HOUCK: Objection. A  
3 mischaracterization. I think the witness just  
4 indicated that it's not an exemption, it's that  
5 the measure allows for certain infrastructure.

6 HEARING OFFICER GEFTER: Would you  
7 refrain your question please?

8 MR. SARVEY: What other public services  
9 are allowed by Measure D?

10 MR. MARTINELLI: Well, there are all  
11 sorts of public services allowed by Measure D.  
12 Schools, parks, aqueducts, highways,  
13 thoroughfares, roads, utility line substations, I  
14 could go on.

15 MR. SARVEY: Would a water treatment  
16 facility be allowed under Measure D?

17 MR. MARTINELLI: Yes.

18 MR. SARVEY: Would a nuclear power plant  
19 be allowed under measure D?

20 MS. HOUCK: Objection. There's state  
21 law that addresses nuclear power plant issues, and  
22 that would not be something that the county would  
23 likely be permitting.

24 HEARING OFFICER GEFTER: Objection  
25 sustained.

1           MR. GALATI: Again, I would also renew  
2 my objection to the line of questioning. Measure  
3 D is not on trial here. That is a county plan, it  
4 is a initiative that modified a county plan. The  
5 board of supervisors, which is the lead agency  
6 with respect to interpretation of that plan, have  
7 opined in a resolution on this particular topic.

8           And I think that we're wasting time  
9 duplicating what was done in East Altamont that  
10 was not helpful for the Commission's decision.  
11 And clearly in this case we don't need to do that.  
12 We do have a board of supervisors resolution.

13           HEARING OFFICER GEFTER: I'll allow Mr.  
14 Sarvey to ask a few more questions along this  
15 line, and then we'll end this line of questioning.  
16 Also, I had a request from the audience, for the  
17 parties to please speak up, they can't hear you in  
18 the audience.

19           Mr. Sarvey, when you ask your question  
20 could you please speak up please?

21           MR. SARVEY: That's okay. I'll just go  
22 straight to public comment.

23           HEARING OFFICER GEFTER: Have you  
24 completed your cross-examination, Mr. Sarvey?

25           MR. SARVEY: Well, I think I'm not going

1 to be allowed to ask any more questions, so I'll  
2 proceed to public comment. thank you.

3 HEARING OFFICER GEFTER: You are welcome  
4 to ask more questions, we're just ending that line  
5 of questioning.

6 MR. SARVEY: That's okay, that's fine.  
7 I object, and I'll just go on to public comment.

8 HEARING OFFICER GEFTER: Okay. At this  
9 point do you want to move any of your exhibits  
10 into the record? You mentioned exhibit 75A, which  
11 is Measure D?

12 MR. SARVEY: Yes, I have 75A, --

13 HEARING OFFICER GEFTER: And also your  
14 resolution from the Sierra Club, exhibit 74A, do  
15 you want to move that?

16 MR. SARVEY: Yes -- wait a minute. 74A,  
17 74B, and -- 74, 75, and --

18 HEARING OFFICER GEFTER: Okay, so you're  
19 offering 75, which is the testimony of Mr.  
20 Schneider?

21 MR. SARVEY: Yes, I'm offering Mr.  
22 Schneider's testimony, I'm offering the Measure D,  
23 and I'm offering the Sierra Club resolutions from  
24 East Altamont Energy Center and the Midway Tesla  
25 Power Plant opposition.

1           HEARING OFFICER GEFTER: Okay, so now we  
2 have four exhibits that you're offering into the  
3 record. Are you prepared to present the direct  
4 testimony of Mr. Schneider at this time?

5           MR. SARVEY: Yes I am.

6           HEARING OFFICER GEFTER: Why don't we  
7 have Mr. Schneider sworn.

8           MR. GALATI: Ms. Gefter, I apologize,  
9 but could we make sure that, what I have is a  
10 copy, I believe, of 74, which is Measure D.

11          HEARING OFFICER GEFTER: It's 75A.

12          MR. GALATI: 75A is Measure D? Before I  
13 -- I want to make sure that this is a copy of  
14 Measure D. Could Mr. Schneider testify to that,  
15 and then I'll have no objection to it coming in.

16          HEARING OFFICER GEFTER: Mr. Schneider,  
17 will you come up please and be sworn in.  
18 Whereupon,

19                   DICK SCHNEIDER  
20 was called as a witness herein, and after first  
21 having been duly sworn, was examined and testified  
22 as follows:

23          MR. SARVEY: Could you state your name  
24 for the record please, and spell it?

25          MR. SCHNEIDER: My name is Dick

1 Schneider, spelled S-c-h-n-e-i-d-e-r.

2 MR. SARVEY: And did you prepare the  
3 testimony?

4 MR. SCHNEIDER: Yes I did.

5 MR. SARVEY: Could you give us a brief  
6 summary of your qualifications?

7 MR. SCHNEIDER: I've been a member of  
8 the Sierra Club since 1974. Most of the last four  
9 years, since 1999, I've been conservation Chair of  
10 the Bay chapter of the Sierra Club. During that  
11 time Measure D was drafted and put before the  
12 electorate. I was present at scores of drafting  
13 sessions for Measure D, which were held in public  
14 locations.

15 Prior to the measure qualifying for the  
16 ballot I collected approximately 500 signatures,  
17 talking with 500 residents of Alameda County to  
18 explain what the measure was about and to secure  
19 their signatures.

20 After the measure qualified for the  
21 ballot I became co-Chair of the Campaign  
22 Committee. I spoke at numerous community  
23 meetings, before groups, before elected councils.  
24 I met with people describing the measure, what it  
25 would do. Subsequent to the passage of the

1 measure I've been its primary spokesperson for the  
2 Sierra Club.

3 I've interacted with the Alameda County  
4 counsel's office, in defense of Measure D, as  
5 recently as two days ago. So I'm quite aware of  
6 the intent of the drafters of the measure, what it  
7 does, how it amends county policy.

8 MR. SARVEY: And do you have any  
9 additions to your testimony?

10 MR. SCHNEIDER: No.

11 MR. SARVEY: The witness is available  
12 for cross-examination.

13 HEARING OFFICER GEFTER: Okay.  
14 Applicant, do you have any cross-examination of  
15 the witness?

16 MR. GALATI: Mr. Schneider, were you  
17 present at the February 6th hearing at the Alameda  
18 County board of supervisors in which they were  
19 considering tentative cancellation of the  
20 Williamson Act to contract for the Tesla Power  
21 Project?

22 MR. SCHNEIDER: I believe I was.

23 MR. GALATI: And did you, in that  
24 matter, tell the board of supervisors, in your  
25 testimony, that you thought the project was not

1 consistent with Measure D?

2 MR. SCHNEIDER: Yes I did.

3 MR. GALATI: No further questions.

4 HEARING OFFICER GEFTER: Staff?

5 MS. HOUCK: Staff has no questions for  
6 this witness.

7 HEARING OFFICER GEFTER: All right. Mr.  
8 Sarvey, do you want to move your exhibits into the  
9 record, and I know that Mr. Galati had requested  
10 that Mr. Schneider indicate the document that you  
11 have offered as 75A, Measure D, is an accurate  
12 copy of Measure D.

13 MR. SCHNEIDER: So long as all the pages  
14 are here, this is the document.

15 HEARING OFFICER GEFTER: Okay. Are  
16 there any objections to exhibits 74B, 75A and 75B?

17 MR. GALATI: No objection.

18 HEARING OFFICER GEFTER: Staff?

19 MS. HOUCK: No objection.

20 HEARING OFFICER GEFTER: All right, Mr.  
21 Sarvey, your four exhibits are now received in the  
22 record, as listed, related to land use. At this  
23 time we had some requests for public comment on  
24 land use.

25 Mrs. Sarvey, do you want to come forth



1 and offer your public comment at this time? Also,  
2 could somebody help Mrs. Sarvey with the  
3 microphone? Move it so it will be closer to her  
4 face? Actually, if you'd move the podium all  
5 together, because we don't need it. Thank you  
6 very much. Mrs. Sarvey?

7 MS. SARVEY: My name is Susan Sarvey.  
8 I'm with Clean Air for Citizens and Legal  
9 Equality. I'm a little concerned that we just had  
10 land use, and I didn't really understand why it  
11 wasn't appropriate to discuss in land use that  
12 there was a biological preserve next to the land.

13 I understand biology belongs in biology,  
14 when we discuss what biology is in the biological  
15 preserve, but I think it is critical that we  
16 discuss the fact that there is a biological  
17 preserve next to a power plant, regardless of what  
18 makes it a biological reserve.

19 We have endangered species in these  
20 areas. We have all different kinds of mitigation  
21 that need to be done, and you can't just say "I  
22 don't want to talk about a biological preserve and  
23 whether it's compatible here as a land use,"  
24 because it's the land use issue, not the animal,  
25 that is of paramount importance.

1           If you keep not discussion appropriate  
2 land use, we are going to have mitigated to move  
3 endangered species, biological resources, and it  
4 will be all for naught, because you will come  
5 along later and say we don't have to discuss what  
6 this land use is for, and so those species and  
7 those animals are not protected.

8           So I think biology, in terms of the land  
9 that it's sitting on, should definitely be  
10 explored in land use. I had some concerns when I  
11 was here yesterday.

12           I was under the impression, if I  
13 understood correctly, that many parcels of land  
14 were looked at that were possible sites for this  
15 power plant, and there wasn't really anything  
16 wrong with them, and yet we're taking agricultural  
17 land out of the Williamson Act, when other land is  
18 available that is suitable. And I don't really  
19 understand why we're doing that.

20           And then when, I really got confused  
21 when they were discussing that the biological  
22 preserve was going to have some agricultural  
23 thing. If you're a biological preserve, you're a  
24 biological preserve. There's no agriculture going  
25 on there.

1           So I'm really concerned about the fact  
2   that we've closed land use, we have not  
3   established how agriculture is going to be  
4   protected, we haven't established why we had to  
5   take this particular parcel out of agricultural  
6   use to build this power plant when there were ones  
7   right by it that were not in the Williamson Act,  
8   and we're not discussing at all the ground of the  
9   biological preserve being preserved as a preserve,  
10   and not making that land not suitable due to  
11   noise, lighting, and whatever else -- paving dust.

12           I mean, there's so many things that come  
13   with the power plant that we learned when we built  
14   the power plant over by my house, the GWF one.  
15   There's a lot of issues that impact both human  
16   beings and wildlife.

17           So I'm totally okay with you talking  
18   about what's in the preserve in biology, but I  
19   really would urge you to rethink your thought that  
20   the actual land use of the biological preserve  
21   does not need to be discussed.

22           And I'm really unclear why it is so easy  
23   to take this land out of the Williamson Act and  
24   agricultural use, when we're trying to do the same  
25   thing to expand our cemetery, and we've been doing

1 it for years and nobody will let us out.

2 And it just kind of blows my mind that  
3 they just came in and its no problem and there's  
4 other suitable sites right nearby. So I think you  
5 need to talk about land use a little more,  
6 personally. Thank you.

7 HEARING OFFICER GEFTER: And Mr. Sarvey,  
8 you also wanted to make public comment on the land  
9 use topic?

10 MR. SARVEY: Yes I do. As I said  
11 before, the purpose of these hearings is to  
12 discuss the issues, resolve issues, and I  
13 understand and respect Mr. Galati's position of  
14 objecting to every question I have.

15 But what I don't understand is the  
16 Commission's continual sustaining of those  
17 objections, when the purpose that we're here for  
18 is to discuss these issues. I asked is a power  
19 plant compatible with a biological preserve.  
20 There's a biological preserve next to this power  
21 plant.

22 They're proposing to convert the land  
23 adjacent to the power plant to a biological  
24 preserve. One of the clear findings that had to  
25 be made by the county of Alameda for this project

1 was that adjacent land would not be converted from  
2 agricultural use. I was not even allowed to ask  
3 that question.

4 Now, Commissioner Geesman's fully aware  
5 of what the status of this is. Whether you object  
6 or don't object, it's on the record, and he  
7 understands it, and he knows. So I hope that,  
8 when he makes his decision he forgets about all  
9 the procedure and technical, and looks at the  
10 facts. And the facts are there. Thank you.

11 HEARING OFFICER GEFTER: And what facts  
12 are you referring to, Mr. Sarvey?

13 MR. SARVEY: That was public comment.

14 HEARING OFFICER GEFTER: I'm not clear.  
15 Would you please specify?

16 MR. SARVEY: That was public comment. I  
17 don't have to clarify anything.

18 COMMISSIONER GEESMAN: Let me say, to  
19 both Mr. and Mrs. Sarvey, we will address the  
20 biological issue. We organized the hearing, and  
21 our decision is organized in particular components  
22 that our statute calls for.

23 The land use discussion is primarily a  
24 LORS discussion. And I understand the frustration  
25 of dealing with a complex statute, but we are a

1 creature of statute. The Legislature, and the  
2 authors of our state constitution, determined that  
3 land use decisions in general are best made by  
4 units of local government.

5 So, while the Energy Commission does  
6 have an override capability on local land use  
7 decisions, one of the principal functions of our  
8 hearing and the land use component of our hearing  
9 is determining what the relevant unit of local  
10 government has determined in terms of compliance  
11 with LORS.

12 So there's no intent to cut off inquiry  
13 into the biological issue, and we will get to  
14 that.

15 MS. SARVEY: Susan Sarvey. So, my  
16 understanding is when we go into biology now we  
17 will discuss the laws, rules and ordinances for a  
18 biological preserve at that time --

19 COMMISSIONER GEESMAN: Sure.

20 MS. SARVEY: -- and how they relate to  
21 the laws, rules and ordinances for agricultural  
22 and power plants --

23 COMMISSIONER GEESMAN: You're certainly  
24 welcome to do that.

25 MS. SARVEY: -- and how they may be

1 incompatible at that time. Thank you.

2 HEARING OFFICER GEFTER: Before we move  
3 on from the land use topic, I have some questions  
4 regarding exhibit, I believe it's 16, which is the  
5 resolution from the county on the cancellation of  
6 the Williamson Act contract. I'm sorry, it's not  
7 16 -- I believe it's 21, exhibit 21.

8 One of the whereas's in the resolution  
9 is that the power plant project has voluntarily  
10 agreed to dedicate a permanent agricultural  
11 conservation easement to Alameda County. So the  
12 100 acre parcel that we've been discussing for the  
13 last hour is identified in the resolution as a  
14 permanent agricultural conservation easement. And  
15 Applicant concedes that, right?

16 MR. GALATI: Yes, that is correct.  
17 That's why we agreed to your request at the  
18 prehearing conference that staff include that as a  
19 condition of certification to make the Energy  
20 Commission have some ability to verify that that  
21 had been done.

22 HEARING OFFICER GEFTER: Okay. And how  
23 is that related to the biological preserve that  
24 Mrs. Sarvey has referred to?

25 MR. GALATI: I'll actually have Mr. Busa

1 answer that question.

2 MR. BUSA: There are several parcels  
3 we're talking about here. The 100 acre parcel is  
4 north of the project site. The biological  
5 preserve, I believe, that Mrs. Sarvey was  
6 referring to is the Haera Wildlife Mitigation Bank  
7 that is south of the project site.

8 There's additional land that we'll get  
9 to in biology that actually connects all of those  
10 parcels together. The 49 acre laydown area is  
11 actually under contract from wildlands to the  
12 power plant as the laydown area is. So they've  
13 excluded that from their preserve, and contracted  
14 with the power plant to sell that land, and I  
15 think we'll get to that further in biology.

16 HEARING OFFICER GEFTER: So I think that  
17 perhaps there's a confusion here as to these  
18 different areas. The 100 acre agricultural  
19 preserve, is that going to be dedicated to  
20 agriculture?

21 MR. BUSA: As Mr. Martinelli said  
22 before, there is a crossover in compatibility.  
23 For example, I can tell you that, on the Haera  
24 Mitigation Bank, they are currently using that as  
25 an agricultural use for cattle grazing, which is



1 typical of all of these parcels in the area.

2 So, in my opinion, it is compatible in  
3 certain circumstances. And we would allow the  
4 cattle grazing to continue on that, and on the 100  
5 acres, along with designating it as a biological  
6 preserve also.

7 HEARING OFFICER GEFTER: I'm confused.  
8 you also mentioned a 49 acres parcel?

9 MR. BUSA: That's correct.

10 HEARING OFFICER GEFTER: Is that the  
11 biological preserve parcel?

12 MR. BUSA: No, that's totally -- the  
13 biological preserve, the Haera wildlife Mitigation  
14 bank is a separate, several hundred acres to the  
15 south of the power plant.

16 HEARING OFFICER GEFTER: And what is the  
17 49 acre parcel then?

18 MR. BUSA: It is adjacent to both of  
19 those.

20 HEARING OFFICER GEFTER: It's adjacent  
21 to the 100 acre agricultural preserve and to the  
22 Haera biological reserve?

23 MR. BUSA: Yes. It is not adjacent to  
24 the 100 acres, that's correct.

25 HEARING OFFICER GEFTER: It is adjacent,

1     so it's an additional 49 acres, in addition to the  
2     100 acres agricultural preserve.

3             MR. BUSA: That's correct.

4             HEARING OFFICER GEFTER: All right.

5     With respect to the language of condition land 7  
6     proposed by the staff and also I believe it's been  
7     modified upon discussion with the Applicant, I'm  
8     concerned that this particular condition is not  
9     very clear as to what is going to be done with  
10    this agricultural conservation easement.

11            And I wonder if the language can be  
12    fine-tuned to indicate what in fact the  
13    agricultural preserve would be dedicated to?  
14    Because it does not incorporate some of the  
15    testimony and the evidence that you've offered  
16    today on this prescription.

17            MS. HOUCK: I would be concerned about  
18    having it too strictly defined. We can discuss  
19    this further next week, when the representative  
20    from the U.S. Fish and Wildlife Service is here,  
21    but in their discussion with staff and I believe  
22    with Applicant, there's also conditions that  
23    they're going to be requiring the Applicant to  
24    comply with in order for it to be used as  
25    biological mitigation.

1 HEARING OFFICER GEFTER: That's fine.

2 And I think that the Sarvey's have brought up a  
3 point which I think needs to be cleared up.

4 There seems to be an overlap here  
5 between the agricultural easement and the  
6 permanent agricultural land preserve and the use  
7 either of this area or the 49 acre adjacent area  
8 as a biological preserve, and we need to draw  
9 distinctionS, or we need to show there's an  
10 overlap.

11 MS. HOUCK: Okay, and I think that --  
12 and staff may be able to answer this better, but I  
13 think that was the intent of developing the plan,  
14 so it would be consistent with the conditions that  
15 the Applicant is going to have to comply with in  
16 the biological resource section regarding  
17 development of their mitigation implementation  
18 plan.

19 And that process, we wanted to ensure  
20 that they could coincide, and that's why the  
21 conditions requests that they have a plan approved  
22 by the Commission.

23 HEARING OFFICER GEFTER: Again, if the  
24 plan is incorporating a biological mitigation  
25 preserve, then we ought to say that here, in land

1 7. So that when it gets to compliance, the  
2 compliance project manager would also know that  
3 land 7 is also related to a biology condition.

4 MS. HOUCK: Would it be sufficient to  
5 reference the biological condition in regards to  
6 insuring that the compliance staff are aware of  
7 any other potential condition?

8 HEARING OFFICER GEFTER: That would be a  
9 good first step, but I haven't seen the biology  
10 condition either. So that's a beginning.

11 MS. HOUCK: And we also don't want to  
12 limit what the county is going to require as well  
13 for how they deal with the easement. And maybe  
14 the Applicant can better address that.

15 HEARING OFFICER GEFTER: Well, the other  
16 question too, with respect to land 7, it says that  
17 the Applicant's payment of monies to the county,  
18 "to the county of Alameda or other recognized land  
19 trust funds", it doesn't indicate the amount of  
20 money that would be paid.

21 And I'm not really clear, when you're  
22 talking about a "recognized land trust fund", what  
23 that refers to. Perhaps the parties have  
24 something in mind that the condition should  
25 specify.

1 MS. ALLEN: Alameda County is in the  
2 process of forming an agricultural land trust. At  
3 this point it is not established, such that it  
4 would be in a position to receive money. This is  
5 a work in progress, so the concept is that the  
6 Applicant would provide the money to Alameda  
7 County in trust for placement into that fund when  
8 it's established, or if it's taking a long time  
9 for the trust to be established then another  
10 recognized land trust would be used for purchasing  
11 mitigation land.

12 So an example of another recognized land  
13 trust is the American Farmland Trust. There are  
14 other trust possibilities in the overall Bay Area.  
15 So we needed to allow the Applicant flexibility to  
16 choose the trust, depending on what was happening  
17 with Alameda County's progress.

18 HEARING OFFICER GEFTER: Okay. That's  
19 fine, to allow the flexibility. But the language  
20 "recognized land trust" -- is that a term of art?  
21 I mean, I'm not sure what recognized land trust  
22 means. So perhaps that can be more specific. You  
23 might indicate what a recognized land trust is.

24 Also, I think the land trust should  
25 incorporate your description of the situation

1 right now, which is that the county is in the  
2 process of developing its own land trust, but due  
3 to possible delay or postponement in that process,  
4 you know, the Applicant retains an option to  
5 provide funds to another recognized land trust.

6 If language can be drafted to  
7 incorporate that into this condition I think it  
8 would be much clearer to all the parties involved  
9 as to what's going on. Also, I'm not clear why  
10 there is not a specific amount of money required  
11 from the Applicant.

12 MS. HOUCK: I think it's because we're  
13 looking at a particular parcel size, and -- but if  
14 I could have just a moment, off the record.

15 HEARING OFFICER GEFTER: Thank you.  
16 (Off the record.)

17 HEARING OFFICER GEFTER: Back on the  
18 record. Mr. Galati, are you prepared now to  
19 answer some of the questions we talked about  
20 before going off the record?

21 MR. GALATI: Yes we are. I can present  
22 the witness Dwight Mudry, or we can handle that in  
23 our direct testimony for biology, which I  
24 understand we might be handling--

25 HEARING OFFICER GEFTER: What I want to

1 clear up is the difference, if there is a  
2 difference, between the 100 acre agricultural  
3 preserve that is being developed under the partial  
4 cancellation of the Williamson Act resolution, and  
5 included in land 7, and the distinction between  
6 this agricultural preserve and the biology  
7 mitigation that is being required in the biology  
8 topic. And how these two plans overlap.

9 MR. MUDRY: My name is Dwight Mudry.  
10 I'd just like to clarify some of the issues  
11 related to the confusion between mitigation's  
12 plans and agriculture.

13 There was an exhibit submitted, exhibit  
14 14, submitted some time ago. And that exhibit  
15 originally was confidential when the properties  
16 were still under consideration, but now is  
17 available for review. And that particular exhibit  
18 is called the Tesla Power Project biological  
19 mitigation proposal.

20 And there is a very clear drawing at the  
21 end of that document, which shows all of the  
22 properties which will be included as part of the  
23 mitigation plan and under conservation easements  
24 for biology. And I would just like to summarize  
25 those properties.

1           HEARING OFFICER GEFTER: Does that  
2 include the agricultural preserve?

3           MR. MUDRY: Yes it does. First of all,  
4 the project requires approximately 145.5 acres of  
5 land as mitigation property. And that calculation  
6 comes -- as we'll explain later in biology -- from  
7 an evaluation of the impacts to various species  
8 and how much property should be set aside,  
9 considering those species.

10           The Applicant proposed to dedicate 145.5  
11 acres in the following fashion. First of all,  
12 they would dedicate 99.97, or approximately 100  
13 acres, in a parcel north and west of the project  
14 site. And there is in that exhibit that I  
15 mentioned a drawing which illustrates clearly each  
16 of the properties.

17           This parcel will be owned by the  
18 Applicant, and these lands would be managed, in  
19 perpetuity, through conservation easement. They  
20 would then also dedicate 19.7 acres south of the  
21 project site. The Applicant will purchase this  
22 parcel from Wildlands Incorporated. And these  
23 lands will be managed in perpetuity through a  
24 conservation easement.

25           Following project construction and



1 installation of landscaping, the Applicant will  
2 dedicate 25.8 acres of the project site, which is  
3 outside of the project fence line, as additional  
4 property. This parcel is optioned right now by  
5 the Applicant, and these lands will be managed in  
6 perpetuity through a conservation easement.

7           Following our presentation of the  
8 proposed conservation lands, in discussions with  
9 Fish and Game, Fish and Wildlife Service, and  
10 staff, it was determined that the Fish and  
11 Wildlife Service was very interested in properties  
12 as well.

13           All of this met the amount of  
14 conservation lands that had to be dedicated. They  
15 were also most interested in preserving lands  
16 which would provide some connectivity between  
17 various lands that kit foxes were known to  
18 inhabit, including these lands surrounding the  
19 property.

20           So the Applicant examined other  
21 properties in the area, and presented to them, to  
22 the Fish and Wildlife Service staff and Fish and  
23 Game, several properties that would meet that  
24 requirement. In the end an additional property --  
25 in summary, the ones that I mentioned before, the

1 three properties, tallied up to approximately  
2 145.5 acres, which is the required mitigation.

3 But they went on to find an additional  
4 property, which was 320 acres. And their proposal  
5 is to dedicate 320 acres in a parcel west of the  
6 project site and southeast of the intersection of  
7 Grant Line Road and I-580. This parcel will be  
8 owned by the Applicant, and these lands will be  
9 managed in perpetuity through a conservation  
10 easement.

11 Now these lands will be managed for  
12 maintaining populations of kit fox and burrowing  
13 owl, as the two main species, but they'd also be  
14 available to any other species that would inhabit  
15 the same type of habitat. One of the methods of  
16 maintaining this conservation land for this  
17 particular group of species is the maintenance of  
18 these lands as grazing lands, which is an  
19 agricultural use.

20 HEARING OFFICER GEFTER: Which lands  
21 will be --

22 MR. MUDRY: All of these lands, a total  
23 of 467 acres.

24 MR. GALATI: Dr. Mudry, specifically  
25 with respect to the 99 or let's call it the 100

1 acre parcel north of the project site -- actually  
2 I'm not saying that right -- north of the project  
3 site, that is also the subject of an agricultural  
4 conservation easement.

5 Could you explain to us how those uses  
6 are compatible for what you just described?

7 MR. MUDRY: Conservation of these  
8 particular species requires that certain types of  
9 habitat be available. The habitat in this area is  
10 generally non-native species grassland, which is  
11 used for grazing. So grazing is an agricultural  
12 use which would continue on that property under  
13 the conservation easement, and would be an actual  
14 maintenance mechanism for maintaining the habitat  
15 for these species.

16 MR. GALATI: And Dr. Mudry, are you  
17 familiar with the history of that 100 acres  
18 parcel?

19 MR. MUDRY: No I'm not.

20 MR. GALATI: In your review of it, did  
21 it look like that land had been used in the past  
22 for grazing?

23 MR. MUDRY: Oh, of course. The  
24 property, the 100 acre parcel, is adjacent to the  
25 project site. It's also adjacent to an abandoned

1 railway in the area. The area is fenced and its  
2 used for grazing.

3 That 100 acre parcel has a number of  
4 burrowing owl burrows, it also has burrows in  
5 holes that could be used for kit fox, although  
6 none were seen, and so the history of that  
7 property has been long-term grazing use.

8 It continues to be so, and under the  
9 conservation easement would continue to be used in  
10 that fashion.

11 HEARING OFFICER GEFTER: This 100 acre  
12 agricultural preserve, is this adjacent to the  
13 project site?

14 MR. MUDRY: It's immediately north and  
15 west of the project site, and it --

16 HEARING OFFICER GEFTER: Is this between  
17 the project site and the Tesla substation?

18 MR. MUDRY: No it is not. And I'm just  
19 going to give you this drawing so you'll clearly  
20 see where it is. The drawing is in the record.

21 HEARING OFFICER GEFTER: The drawing is  
22 part of exhibit 14?

23 MR. GALATI: That's correct. Dr. Mudry,  
24 can you also just point that out on the big map  
25 that is currently to your left?

1           MR. MUDRY: Right. The project site is  
2 right here, and on this aerial photo it's been  
3 superimposed with project facilities. This is the  
4 Tesla substation about a half mile south. The  
5 project mitigation lands are comprised of 100  
6 acres, approximately 100 acres that are north of  
7 the site, right in this area, and it extends down  
8 on this side. So it's kind of an L-shaped piece.

9           HEARING OFFICER GEFTER: An L-shaped  
10 piece that kind of encompasses the project site  
11 itself?

12          MR. MUDRY: It actually wraps around, --

13          HEARING OFFICER GEFTER: Wraps around.

14          MR. MUDRY: -- it's north of this  
15 railway and kind of wraps around the site from the  
16 north to the west. In addition I mentioned there  
17 are four properties that are part of the  
18 mitigation proposal.

19                I mentioned that there are four  
20 properties that are part of the mitigation  
21 proposal. The first is that 100 acres, it's  
22 actually 99.7, roughly 100 acres, which is north  
23 of the Bannon railway, north and west of the site.

24                Additionally, there are properties on  
25 the site. The project site occupies, or the

1 project property is about 60 acres, but the  
2 project facility only occupies a portion of that.  
3 So there are a total of 25.8 acres that are  
4 actually on the project property that are also  
5 part of the dedication. They are all outside of  
6 the project fence line, some of which have some  
7 landscaping on them.

8           There's a third property, which is part  
9 of the laydown area that the Applicant proposes to  
10 use. There's a 47-acre laydown area. They're  
11 going to use a portion of that, and the part that  
12 they're not using will eventually be dedicated,  
13 it's 19.7 acres. So that would be dedicated as a  
14 part of it.

15           So those three pieces make up what is  
16 required by the Fish and Wildlife Service and Fish  
17 and Game, they normally require when they're  
18 looking for mitigation to the property. In  
19 addition, as I mentioned, there was a concern  
20 about connectivity for the species in the area.

21           And so the Fish and Wildlife Service was  
22 very concerned that they would like to have some  
23 property that gave greater connection to some of  
24 the spots in the area. And they also are  
25 pursuing, I understand, other properties which

1 would be compatible with these to provide a  
2 continuous zone where these animals and birds  
3 could roam.

4 And so for that purpose the Applicant  
5 proposed to require another 320 acres, which is  
6 west of the project facility, but a large block  
7 here. And what that does is it creates a large  
8 block of land, including the Haera Mitigation  
9 Area, the 320 acres here, the 100 acres here, and  
10 the 19 acres down here -- which also includes a  
11 piece of Patterson Run Creek, which is a habitat  
12 area, the current habitat area, which would be a  
13 valuable piece to preserve into perpetuity.

14 All of these lands would be managed in  
15 perpetuity, which means forever. And that's a  
16 very interesting concept, forever, it's an awfully  
17 long time. So although --

18 HEARING OFFICER GEFTER: May I interrupt  
19 for one minute. We're going to get into this in  
20 more depth in the biology topic. You mentioned  
21 the Haera area, is that in addition to the 320  
22 acre property?

23 MR. MUDRY: No. I only mentioned that  
24 because it is an adjacent property, and it is  
25 currently being managed in the same fashion as a

1 conservation property.

2 HEARING OFFICER GEFTER: So that's not  
3 included in your 320 acres.

4 MR. MUDRY: No it is not.

5 HEARING OFFICER GEFTER: We'll get to  
6 that when we get to the biology section. So what  
7 I wanted to find out from you, because we're still  
8 on land use, and we're still talking about the 100  
9 acre agricultural preserve, what you're preserving  
10 here is what you have already, which is grazing  
11 land, is that correct?

12 MR. MUDRY: Yes.

13 HEARING OFFICER GEFTER: Is there cross-  
14 examination of the witness?

15 MS. HOUCK: No questions.

16 HEARING OFFICER GEFTER: Okay. Do you  
17 have questions?

18 MR. SARVEY: I just have one question.  
19 I'm a little confused, when he says the  
20 conservation easement, he's talking about a  
21 combination agricultural and biological easement  
22 at the same time? Is that what you're referring  
23 to?

24 MR. MUDRY: Say that again?

25 MR. SARVEY: When you say a conservation



1     easement, you're saying that this property will be  
2     used for agricultural and biological mitigation at  
3     the same time, is that what I'm understanding, or  
4     am I wrong?

5             MR. MUDRY:  The conservation easement  
6     dedicates the land to biological use with the use  
7     of agricultural techniques, in case of grazing, to  
8     maintain that property in the proper grassland  
9     habitat.

10            MR. SARVEY:  Is that essentially what  
11     the Haera Mitigation Bank is, an agricultural  
12     preserve that's used for grazing?

13            MR. MUDRY:  Well, I've spoken to a  
14     biologist there from the Haera Bank, and I'm not  
15     sure if somebody is going to --

16            HEARING OFFICER GEFTER:  When we get to  
17     the biology section we're going to talk about the  
18     Haera Mitigation.  Right now we are about to close  
19     the topic of land use.  I appreciate your  
20     explanation.

21            We also need a redraft on condition land  
22     7.  And I am expecting that, the Applicant's staff  
23     can give us that language, if not today by the  
24     18th?

25            MS. HOUCK:  Yes, and just for

1 clarification, our witness, Ms. Allen, does have a  
2 commitment this afternoon, and she does not  
3 believe she'll have time to sort out the traffic  
4 and transportation issues with the Applicant  
5 today, but would it be acceptable to submit those  
6 to the Committee also by the 18th, prior to the  
7 close of hearings and leave traffic and  
8 transportation open at this time?

9 HEARING OFFICER GEFTER: Right. Any of  
10 the proposed modifications should be served on all  
11 of the parties by the 18th, and you can do that by  
12 e-mail. But we need to make sure that everybody  
13 sees the information before the hearing on the  
14 18th. That would be fine.

15 Okay. And then the other, Applicant  
16 referred to exhibit 14 -- if you want to move that  
17 into the record at this time?

18 MR. GALATI: Yes, I'd like to move that  
19 into the record.

20 HEARING OFFICER GEFTER: Any objection?

21 MR. SARVEY: Has that been docketed? I  
22 never received a copy of it that I'm aware of,  
23 so --

24 HEARING OFFICER GEFTER: It says it was  
25 docketed on January 29th, 2003.

1           MR. SARVEY: But I believe he said it  
2 was confidential, and it's now available. Is that  
3 what was said?

4           MR. GALATI: Yes. It was docketed, it  
5 was confidential, it was no longer confidential,  
6 referred in the staff assessment as now was no  
7 longer confidential. We can certainly provide  
8 another copy of that.

9           And in addition, staff has requested  
10 some modifications to the habitat management  
11 portion of the document, which we intend to  
12 address in our direct testimony. So at the end of  
13 that direct testimony we certainly can provide  
14 written clarification with a new document.

15          MR. SARVEY: So that hasn't been  
16 distributed then. Then I would object to --

17          HEARING OFFICER GEFTER: Do you have a  
18 copy of exhibit 14? We can make copies of that,  
19 and make it available to Mr. Sarvey.

20          MR. SARVEY: I have one more request  
21 too.

22          HEARING OFFICER GEFTER: If you have a  
23 question, Mr. Sarvey?

24          MR. SARVEY: Yes, Commissioner Geesman  
25 indicated that we would possibly be discussing

1 land use source and biology, so would it be  
2 possible to have the representative from Alameda  
3 County stay to discuss that? The county's  
4 position in laws, ordinances, regulations on  
5 biological preserves.

6 HEARING OFFICER GEFTER: Mr. Martinelli,  
7 are you able to stay a little bit longer?

8 MR. MARTINELLI: Sure.

9 MR. SARVEY: Thank you.

10 HEARING OFFICER GEFTER: Okay, Mrs.  
11 Sarvey, you have a public comment? If you could  
12 come forward to the microphone?

13 MS. SARVEY: Susan Sarvey, Bay Area  
14 Citizens for Legal Equality. I thought that was  
15 very interesting, when he was talking about this  
16 preserve, and it sounds very interesting.

17 What my concern is, have you discussed  
18 this with the San Joaquin County or city of Tracy  
19 at all, because they are both working towards  
20 reactivating a lot of rails right now that are no  
21 longer in use, because they are trying to put in  
22 mass transit systems for all over the Bay Area and  
23 down the peninsula.

24 They're using tracks that have been out  
25 of service, and it's part of our general plan.

1 And I would just like everyone to know ahead of  
2 time that if they end up using these tracks would  
3 it be compatible with conservation use, having  
4 trains run through there?

5 So if you haven't talked to the county  
6 and the city you might want to ask them what rails  
7 they're activating and working towards activating  
8 at this time. Thank you.

9 MR. GALATI: Ms. Gefter, to clarify the  
10 record, we'd be more than happy to respond to that  
11 if it may be helpful.

12 MR. MUDRY: Right. The railway that I  
13 referred to is an abandoned railway. It's county  
14 property, it's not part of any of the properties  
15 that were mentioned that would be used for  
16 mitigation. The Bannon railway does have some  
17 interesting habitat on it, so it's compatible with  
18 the land uses that we're talking about for the 467  
19 acres.

20 My understanding, and somebody from the  
21 county might clarify that, is that the long-term  
22 use of that Bannon property, it would not be used  
23 for railway, but they're talking possibly about  
24 using it as a bike path or walking area. It has  
25 no other uses right now.

1           HEARING OFFICER GEFTER: Again, we could  
2 include in both land 7 and the appropriate  
3 biological mitigation condition the request, the  
4 requirement that the Applicant consult with the  
5 local jurisdictions about the uses in those areas.  
6 All right.

7           MR. MUDRY: I didn't make the contacts  
8 myself, but I understand the Applicant actually  
9 has been in contact with the county.

10          HEARING OFFICER GEFTER: Okay, again,  
11 you don't have the personal information to provide  
12 to us, so, you know, as the project develops and  
13 the local jurisdiction's determine what they're  
14 going to do with this area, we can put something  
15 in the conditioned hat requires consultation with  
16 those jurisdiction.s

17          MS. HOUCK: Ms. Gefter, land 7 does not  
18 deal with the railway specifically, and staff  
19 would, does not believe it's appropriate to add  
20 language to the condition such as you've just  
21 stated. I believe that the Applicant has been  
22 consulting with the local government and the U.S.  
23 fish and Wildlife Service, and that would also be  
24 a requirement.

25          We have a bio 5 which requires them to

1 develop a communication plan, and they would need  
2 to be in consultation with all of the appropriate  
3 agencies to be in compliance with the conditions  
4 of certification. And through that plan there is  
5 a process set up to ensure that they are  
6 consulting with the appropriate entities,  
7 including all of the appropriate conditions by the  
8 Commission as well as other agencies that would  
9 have jurisdiction over natural resources, such as  
10 wildlife.

11 HEARING OFFICER GEFTER: So you're  
12 suggesting that the 100 acre agricultural preserve  
13 does not cover any areas where there are abandoned  
14 railroads?

15 MS. HOUCK: There's an abandoned railway  
16 near that, but the property with the abandoned  
17 railway is actually county property. It's not  
18 part of the 100 acres that would be put into  
19 habitat conservation.

20 HEARING OFFICER GEFTER: Okay. And land  
21 7 is going to refer to bio 5?

22 MS. HOUCK: We can refer consistent. We  
23 can add language consistent with bio 5.

24 MR. GALATI: I'd also like to point out  
25 just for the record that if the county or the city

1 were to do a project such as that they would have  
2 to consult with Fish and Game and the U.S.  
3 Wildlife Service themselves.

4 HEARING OFFICER GEFTER: All right. I'm  
5 going to receive exhibit 14. We're making new  
6 copies for the Intervenors to review. And if they  
7 have objections after the review they can make  
8 their objections. At this time we're going to  
9 accept exhibit 14 in the record. I expect that we  
10 will discuss exhibit 14 during the biology topic.

11 Land use will remain open to receive  
12 modification to land 7. Thank you very much, and  
13 we're going to move on now.

14 MR. BOYD: I really have to object.  
15 You're accepting an exhibit that I don't even have  
16 a copy of yet.

17 HEARING OFFICER GEFTER: We're moving on  
18 to the next topic, which is biology. And we're  
19 going to ask the Applicant to begin.

20 MS. ALLEN: Ms. Gefter? given the nexus  
21 between biology and land use, I'd like to hear the  
22 biology testimony. If you have questions for me  
23 I'd be available until about 2:45 or 3:00.

24 HEARING OFFICER GEFTER: Thank you very  
25 much. And we're asking Mr. Martinelli to stay



1 too. You could actually continue to sit where you  
2 were sitting if you want to.

3 MS. HOUCK: Prior to the Applicant  
4 introducing their witnesses, I just wanted to note  
5 for the record that Susan Jones will also be a  
6 witness for the topic. She is not available  
7 today. She will be available for the Thursday,  
8 September 18th hearing date that has been  
9 scheduled.

10 Many of the issues that will be  
11 discussed with this topic overlap with her  
12 potential testimony, regarding the mitigation of  
13 the U.S. Fish and wildlife Service. Was very  
14 involved with that process. And our witness is  
15 not able to testify as to issues concerning the  
16 biological opinion. There's also an issue  
17 associated with the biological opinion and the  
18 Buena Vista Shrew, and we would ask that all of  
19 those issues be deferred to the September 18th  
20 date.

21 HEARING OFFICER GEFTER: All right. And  
22 does the Applicant, Mr. Galati, does the Applicant  
23 plan to have your biology witnesses also available  
24 on the 18th, when Ms. Jones from the U.S. Fish and  
25 Wildlife is available?

1 MR. GALATI: Yes.

2 HEARING OFFICER GEFTER: All right. So  
3 we can continue that particular portion of the  
4 biology testimony to the 18th.

5 MS. HOUCK: Thank you.

6 HEARING OFFICER GEFTER: All right. Mr.  
7 Galati, are you available on biology?

8 MR. GALATI: Yes. Dr. Mudry has been  
9 previously sworn. Dr. Mudry, are you familiar  
10 with exhibit 46, which is your testimony  
11 specifically entitled "testimony of Dwight Mudry,  
12 biological resources" dated and docketed August  
13 29th, 2003?

14 MR. MUDRY: Yes I am.

15 MR. GALATI: And did you also file some  
16 other testimony in this matter, specifically  
17 exhibit 156, the rebuttal testimony of Dwight  
18 Mudry -- oh, excuse me, I apologize, that is  
19 exhibit 155, the rebuttal testimony of Dwight  
20 Mudry, biological resources, dated September 5th?

21 MR. MUDRY: Yes I did.

22 MR. GALATI: Are you familiar with  
23 those?

24 MR. MUDRY: Yes I am.

25 MR. GALATI: Do you have any changes or

1 modifications to that testimony?

2 MR. MUDRY: Actually, on the rebuttal  
3 testimony there is a spelling error, if I can find  
4 it. There is an exhibit attached to that, it's  
5 actually exhibit 51, that I mentioned in my  
6 testimony, by William D. & A. Harpster. In my  
7 written testimony it's spelled Harper. It should  
8 be spelled H-a-r-p-s-t-e-r. It's a reference  
9 document.

10 HEARING OFFICER GEFTER: You referred to  
11 exhibit 51, that is the FSA.

12 MR. GALATI: I apologize. We have  
13 identified it as exhibit 51, it's actually exhibit  
14 151.

15 HEARING OFFICER GEFTER: Thank you. But  
16 then 151 is the same as exhibit 58.

17 MR. GALATI: We'll use exhibit 58, I  
18 apologize. Dr. Mudry, are you referring to  
19 exhibit 58, filed by staff and entitled "the  
20 status of the Buena Vista Lake Shrew report" dated  
21 October 29th, 2001?

22 MR. MUDRY: Yes I am.

23 MR. GALATI: Thank you.

24 MR. MUDRY: I have no other corrections  
25 aside from that typo.

1           HEARING OFFICER GEFTER: Dr. Mudry, did  
2 you review the testimony submitted in this matter  
3 by Dr. Shawn Smallwood?

4           MR. MUDRY: Yes I did.

5           MR. GALATI: Specifically, with respect  
6 to that testimony, are you familiar with one of  
7 the items that is identified on page two of that  
8 testimony, which is also exhibit --

9           HEARING OFFICER GEFTER: Exhibit 103.

10          MR. GALATI: Exhibit 103. On page two  
11 there is an item, point number two. Are you  
12 familiar with that??

13          MR. MUDRY: Yes I am.

14          MR. GALATI: Is it correct that that  
15 point -- it says there was no detailed public  
16 review of the biological resources mitigation  
17 implementation and monitoring plan?

18          MR. MUDRY: Well, I believe there was  
19 review. That plan was submitted in three  
20 versions. Initially it was submitted as a data  
21 response, and an outline of that plan was  
22 submitted.

23          Later on we submitted a preliminary  
24 draft of that plan, which was submitted I think  
25 around May of 2002. And subsequently a final

1 version was submitted in December of 2002. So it  
2 has been available.

3 MR. GALATI: There is an allegation that  
4 that plan is not complete enough for public  
5 review. Do you have an opinion on whether that  
6 plan is complete?

7 MR. MUDRY: Yes. The plan is very  
8 complete.

9 HEARING OFFICER GEFTER: Do we have a  
10 copy of that plan as part of the exhibit?

11 MR. GALATI: It is an attachment to a  
12 data response, and I can get that particular  
13 reference. I would have to go my files over  
14 here to do that, so can I correct that at the end  
15 of our testimony?

16 HEARING OFFICER GEFTER: That would be  
17 fine.

18 MR. MUDRY: The plan is fairly complete.  
19 It actually goes into the purpose of what we call  
20 the BRMIMP. It goes into the background of why  
21 it's required, what documents apply to it. It  
22 discusses the project description, the project  
23 construction, the schedule.

24 It goes into the responsibilities,  
25 qualifications and line communication for all of

1 the people who would be involved in biological  
2 mitigation, including the agency responsibilities,  
3 the responsibility of the Applicant, and it sets  
4 up lines of communication an authority.

5 It goes into all of the mitigation  
6 measures. This particular document is intended to  
7 provide all of the mitigation measures related to  
8 biology, and so it includes the Applicant's  
9 proposed mitigation as well as all of the staff's  
10 conditions of certifications that might apply to  
11 biology.

12 It also would include when there is a  
13 biological opinion or any permit that is issued,  
14 it would include all of the permit conditions. It  
15 goes into the worker environmental awareness  
16 program, the construction surveys that would be  
17 done, both plants and wildlife.

18 It talks about details of how each  
19 survey would be done, and what mitigation measures  
20 are required. It has a complete construction  
21 mitigation section, and a post-construction  
22 cleanup section, explaining what needs to be done  
23 during each of those stages.

24 It has all of the measures required  
25 during project operation, and the measures

1 required for closure of this project. It also has  
2 a complete section under environmental monitoring  
3 and reporting. So I think it's a very complete  
4 document.

5 MR. GALATI: Now it is true that that  
6 document will be modified to incorporate permit  
7 conditions that are not yet incorporated, correct?

8 MR. MUDRY: Right. The only thing  
9 missing from the document is the final conditions  
10 of certification, and any conditions that would  
11 come out of permits issued in the course of  
12 permitting the project.

13 MR. GALATI: During this project have  
14 you been coordinating with U.S. Fish and Wildlife  
15 Service regarding the biological opinion?

16 MR. MUDRY: Yes. We've submitted  
17 support materials and letters. We've had a couple  
18 of workshops where they were present and we were  
19 present. So we have been coordinating, yes.

20 MR. GALATI: Do you expect the  
21 conditions of the biological conditions to be  
22 drastically different than the conditions that you  
23 are incorporating into the draft permit?

24 MR. MUDRY: Well, we've tried to  
25 incorporate the standard conditions that we

1 usually observe on these projects for the species  
2 involved in this particular draft. But there may  
3 be final conditions that the wording might be  
4 different.

5 But those would be included as part of  
6 the final draft. And I believe that completion of  
7 this, now, is completion of certification. That  
8 is, the staff is requiring that that happened  
9 before project construction begins.

10 MR. GALATI: I'd like to address your  
11 attention, also on page two of Dr. Smallwood's  
12 testimony, point number five specifically reads  
13 "the only biological impact being compensated with  
14 a mitigation measure is the conversion of 27 acres  
15 of land into the facility." Do you have an  
16 opinion about that statement?

17 MR. MUDRY: Right. As I went through on  
18 trying to show the mitigation properties, that  
19 comment seems to refer to the proposal by the  
20 Applicant to dedicate the 467 acres. Of course,  
21 that is not the only mitigation measure. If you  
22 read through the staff's conditions of  
23 certification, there are a large number of  
24 conditions which incorporate both the Applicant's  
25 proposed mitigation measures, as well as the



1 staff's mitigation measures.

2 On one of those, I believe it's bio 12,  
3 there are 42 separate, distinct, mitigation  
4 measures required for different potential impacts.  
5 So it would be incorrect to say that the only  
6 biological impact being compensated with a  
7 mitigation measure is this conversion or  
8 dedication of these properties.

9 MR. GALATI: Dr. Mudry, could you also  
10 expand and explain for the committee, on how you  
11 developed the scope of your work to look for  
12 species and whether the project would have any  
13 impacts on those species?

14 MR. MUDRY: Right. I think in some of  
15 the testimony by Dr. Smallwood there is an  
16 implication, for example, of species inexplicably  
17 being left out of the review. We started the  
18 project evaluation a couple of years ago.

19 First by examining the records, the  
20 California Natural Diversity database is one of  
21 the places we went to come up with our first list  
22 of species considered by the California Fish and  
23 Game as being important. We wrote two letters to  
24 the U.S. Fish and Wildlife Service, and we  
25 received back their listing of species that they

1 considered important.

2 Then we can contacted, as well as Fish  
3 and Wildlife Service, Fish and Game. We also  
4 submitted to the California Energy Commission  
5 staff a proposed protocol for biological surveys.  
6 In each of those areas we obtain advice of species  
7 that should be included.

8 Once we compiled this list of species as  
9 shown in the AFC, we then went through and tried  
10 to determine whether that list of species might be  
11 on the property, first by looking at the habitat  
12 requirements of those species, and then comparing  
13 it to the property.

14 Once we had a narrow list of species we  
15 then conducted the field surveys, which were  
16 rather extensive for all of the project  
17 components. So I'd be surprised if there are any  
18 species that one of the agencies, the staff, or  
19 ourselves had not determined. Or were potentially  
20 on the property and was not investigated.

21 MR. GALATI: Dr. Mudry, are you familiar  
22 with the portion of Dr. Smallwood's testimony that  
23 deals with atmospheric pollution and its effect on  
24 species?

25 MR. MUDRY: Yes I am.

1           MR. GALATI: And are you familiar with  
2 his conclusions?

3           MR. MUDRY: Yes I am.

4           MR. GALATI: And do you agree with those  
5 conclusions?

6           MR. MUDRY: No. I think the inference  
7 is that there was very little attention paid to  
8 the potential for impacts of air quality,  
9 pollutants that might be admitted by the project,  
10 deposition on land.

11           In fact, in the air section, 5.2 of the  
12 Application for Certification, there is a section  
13 dealing with potential impacts to terrestrial  
14 sources. And, as an example, in the air section  
15 they modeled all of the priority pollutants and  
16 compared those emissions and deposition of those  
17 emissions -- they were compared to U.S. Forest  
18 Service significant impact thresholds for  
19 vegetation and ecosystems for class one wilderness  
20 areas.

21           Class one wilderness areas are national  
22 parks and other areas that require a high level of  
23 protection. And the results of that comparison  
24 are in table 5.2-33 in the Application for  
25 Certification. And the table showed --

1           HEARING OFFICER GEFTER: And that is  
2 exhibit one?

3           MR. MUDRY: That is exhibit one, I  
4 believe. And that table showed very clearly that  
5 the project would not reach the significance  
6 level, that in fact it would be far below the  
7 significance level established by the U.S. Forest  
8 Service to protect these class one wilderness  
9 areas.

10          MR. GALATI: Ms. Gefter, I have the  
11 reference to the previously docketed supplemental  
12 response on the draft permit. It was a  
13 supplemental response to data request 40. That is  
14 a portion of our exhibit four.

15          HEARING OFFICER GEFTER: Exhibit four,  
16 what page?

17          MR. GALATI: It is the entire response  
18 to data request 40.

19          HEARING OFFICER GEFTER: So it is  
20 exhibit four?

21          MR. GALATI: Excuse me, it's a portion  
22 of exhibit six.

23          HEARING OFFICER GEFTER: Exhibit six,  
24 response 40?

25          MR. GALATI: Correct. Supplemental data

1 response.

2 MR. GALATI: And that is your BRMIMP  
3 plan?

4 MR. GALATI: Correct.

5 HEARING OFFICER GEFTER: Okay.

6 MR. GALATI: Ms. Gefter, in addition to  
7 exhibit 46, which is the testimony of Dwight  
8 Mudry, and exhibit 156, which is the rebuttal  
9 testimony of Dr. Mudry, Dr. Mudry is --

10 HEARING OFFICER GEFTER: I'm sorry, I  
11 believe it was 155.

12 MR. GALATI: Yes, I keep doing that. I  
13 apologize, 155, the rebuttal testimony on biology  
14 of Dr. Mudry, Dr. Mudry is also sponsoring a  
15 portion of exhibit 1, AFC section 5.3, table 6.1-  
16 1; and section 6.5.3 in appendix J; a portion of  
17 exhibit 2, which is responses to CEC data adequacy  
18 response request numbers biology 1 through biology  
19 9; a portion of exhibit 3, specifically 23 through  
20 45, which I would modify to say that that also  
21 includes the supplemental response identified in  
22 exhibit 6, which is the supplemental response to  
23 number 40; a portion of exhibit 4, specifically  
24 responses 21 through 25; exhibit 14; exhibit 15,  
25 and exhibit 58. We would ask that those be moved

1 into evidence at this time.

2 HEARING OFFICER GEFTER: Exhibit 14, and  
3 tell me the other ones again?

4 MR. GALATI: It is exhibits 14, 15 and  
5 58; 46, 155.

6 HEARING OFFICER GEFTER: We've already  
7 accepted 14, and we're waiting for copies on that,  
8 so they can be distributed to the Intervenors.  
9 Exhibit 58 I believe is sponsored by staff. So  
10 we'll let staff sponsor that. So let's go through  
11 your exhibits again. Exhibits 46, 155, portions  
12 of exhibits 1, 4, 6, --

13 MR. GALATI: Portions of 2 and 3.

14 HEARING OFFICER GEFTER: Exhibits 2 and  
15 3. Are there any objections to those exhibits?

16 MS. HOUCK: No objection.

17 MR. BOYD: I'm just curious. Earlier we  
18 were talking about some of the documents that had  
19 been filed under some protection, or confidential  
20 protection or something. I want to clarify which  
21 document they were claiming were confidential at  
22 the time of filing.

23 MR. GALATI: That was exhibit 14.

24 MR. BOYD: Just exhibit 14. Not the,  
25 what was it, the first one you said, exhibit 4?

1           HEARING OFFICER GEFTER: Exhibit 6,  
2 response 40, supplemental response 40.

3           MR. GALATI: Mr. Boyd, exhibit 6,  
4 response number 40 was the draft biological  
5 resources mitigation implementation and monitoring  
6 plan.

7           MR. BOYD: And then how is it different  
8 from 14?

9           MR. GALATI: Exhibit 14 was a draft  
10 mitigation proposal to acquire additional land for  
11 purposes of the corridor.

12          MR. BOYD: So it's not the --

13          MR. GALATI: It's not the BRMIMP. But  
14 it was, it was confidential for the purposes that  
15 the Applicant was negotiating for the purchase of  
16 lands. So we obviously didn't want to identify  
17 that we were in the market for land and have the  
18 price go up. Once that purchase was acquired the  
19 FSA incorporated and described the lands as not  
20 being confidential any more.

21          HEARING OFFICER GEFTER: All right. Any  
22 objections to the exhibits?

23          MR. BOYD: Just 14, and that's not on  
24 the list that we're talking about, right?

25          HEARING OFFICER GEFTER: 14 has already

1     been received, and you're going to get copies as  
2     we spoke about earlier.

3             MR. BOYD:   Yes, that's fine.

4             HEARING OFFICER GEFTER:   The exhibits  
5     offered by the Applicant on the biology topic are  
6     received into the record.   Do you have any other  
7     witnesses?

8             MR. GALATI:   No I don't.   Dr. Mudry is  
9     available for cross-examination.

10            HEARING OFFICER GEFTER:   Okay.   First  
11    we're going to have the staff put on their  
12    witness, and then we'll ask the Applicant to put  
13    on their direct witness, and then we'll allow  
14    cross-examination.   Staff?

15    Whereupon,

16                    ANDREA ERICHSON  
17    was called as a witness herein, and after first  
18    having been duly sworn, was examined and testified  
19    as follows:

20            MS. HOUCK:   Please state your name for  
21    the record?

22            MS. ERICHSON:   Andrea Erichson.

23            MS. HOUCK:   And was your statement of  
24    qualifications attached to your testimony?

25            MS. ERICHSON:   Yes.



1 MS. HOUCK: And could you briefly state  
2 your education and experience as it pertains to  
3 biological resources?

4 MS. ERICHSON: Certainly. I have a  
5 Bachelor of Science from Rutgers University and  
6 Environmental International Studies. I have a  
7 Masters of Science from the University of  
8 California at Davis, studying environmental  
9 chemistry, toxicology, avian physiology and  
10 behavior, as well as a Masters of Science in  
11 Ecology from the University of California at  
12 Davis, studying ecosystem and habitat and  
13 toxicological issues affecting wildlife inhabiting  
14 mostly the central valley of California.

15 I have ten years of teaching and  
16 research experience, both in applied and basic  
17 ecological sciences. And I have worked for the  
18 California Energy Commission for two years  
19 examining power plant siting cases.

20 MS. HOUCK: Did you prepare the  
21 testimony entitled "biological resources" in the  
22 final staff assessment marked exhibit 51?

23 MS. ERICHSON: Yes I did.

24 MS. HOUCK: And did you also prepare the  
25 testimony entitled "biological resources" in the

1 first addendum to the final staff assessment,  
2 marked exhibit 53?

3 MS. ERICHSON: Yes I did.

4 MS. HOUCK: Do you have any changes to  
5 the written testimony that you're proposing today?

6 MS. ERICHSON: No, I have no written  
7 changes.

8 MS. HOUCK: Do you have any changes or  
9 additions to your testimony?

10 MS. ERICHSON: Well, I would just like  
11 to bring to the attention that staff received a  
12 letter from the Fish and Wildlife Service dated  
13 August 25th and docketed August 26th of 2003.

14 And it was a letter from the Fish and  
15 Wildlife Service discussing the biological opinion  
16 and their concern for a recently listed endangered  
17 species, the Buena Vista Lake shrew. And so,  
18 pending the discussion that will take place next  
19 week, on September 18th, with the Fish and  
20 Wildlife Service representative, staff wants to  
21 bring some attention to the fact that there may be  
22 LORS issues with the project complying, and  
23 working out those concerns with the Fish and  
24 Wildlife Service.

25 MS. HOUCK: And you'll be prepared to

1 discuss that on the 18th, when Ms. Jones is  
2 available?

3 MS. ERICHSON: That's correct.

4 HEARING OFFICER GEFTER: And is that  
5 letter included in exhibit 53?

6 MS. ERICHSON: That exhibit was  
7 attached, that letter was attached to exhibit 53,  
8 and we would request to wait until next week to  
9 have admitted into evidence, as we don't intend to  
10 further discuss it today.

11 MS. HOUCK: In exhibit 53 you have  
12 listed what appear to be some changes to  
13 biological, to several of the conditions of  
14 certification, bio 5, bio 12, bio 13, bio 15, and  
15 bio 16. Is it your intent to substitute the  
16 conditions that are listed in exhibit 53 for those  
17 that are in exhibit 51?

18 MS. ERICHSON: Yes.

19 MS. HOUCK: And all other conditions in  
20 exhibit 51 are still your recommendation?

21 MS. ERICHSON: That's correct.

22 MS. HOUCK: And do the conditions in  
23 your testimony represent your best professional  
24 judgment?

25 MS. ERICHSON: Yes they do.

1 MS. HOUCK: And does the proposed Tesla  
2 Power Project, in your opinion, comply with all  
3 laws, ordinances, regulations and standards, aside  
4 from the issue we're deferring until next week?

5 MS. ERICHSON: Yes.

6 MS. HOUCK: And in your professional  
7 opinion, does the project pose any significant  
8 adverse impacts to the environment?

9 MS. ERICHSON: With staff's proposed  
10 mitigation, and compliance with LORS, staff  
11 believes that the project would not pose  
12 significant adverse impacts to biological  
13 resources.

14 MS. HOUCK: And can you describe the  
15 mitigation that staff is proposing?

16 HEARING OFFICER GEFTER: I want to  
17 interrupt. You indicated that the witness has  
18 made some changes to the conditions and they are  
19 included in exhibit 53?

20 MS. HOUCK: Yes.

21 HEARING OFFICER GEFTER: Tell me where  
22 in exhibit 53 those changes are?

23 MS. HOUCK: On page 2.2-26, actually  
24 2.2-25, there's a section entitled "proposed  
25 conditions of certification". And then on the

1 following page, 26, there are basically the  
2 original conditions restated with edits and  
3 strikeout.

4 HEARING OFFICER GEFTER: Off the record.  
5 (Off the record.)

6 HEARING OFFICER GEFTER: Back on the  
7 record. Staff has a correction to that reference?

8 MS. HOUCK: I would like to correct.  
9 When staff counsel initially referred to exhibit  
10 53 I was intending to reference exhibit 52, which  
11 is the first addendum to the final staff  
12 assessment.

13 And in that document there are several  
14 conditions -- bio 5, bio 12, bio 13, bio 15, and  
15 bio 16, that the witness indicated she is  
16 requesting to have substituted for the original  
17 conditions with those numbers in the final staff  
18 assessment.

19 HEARING OFFICER GEFTER: May I ask a  
20 question on the correction in bio 5. On number  
21 13, it says "performance standards to be used to  
22 help decide when/if the proposed mitigation is not  
23 successful" And this would be included in the  
24 final BRMIMP.

25 And again, for the record, that stands

1 for Biological Resources Mitigation Implementation  
2 and Monitoring Plan, that's the acronym for that  
3 document.

4 My question was, on item 15, it says "if  
5 or when proposed mitigation is not successful".  
6 To me that leaves open a huge whole. The when and  
7 the if and the proposed. We're not talking about  
8 proposed mitigation anymore, we're talking about  
9 actual mitigation plans. And if it is not  
10 successful then it's not the appropriate  
11 mitigation.

12 And so I wanted to ask you to explain  
13 what is meant here, and perhaps the language can  
14 be more specific.

15 MS. ERICHSON: Certainly. Performance  
16 standards are very important to have in any  
17 mitigation implementation and monitoring plan,  
18 because that's the way by which you evaluate  
19 whether or not it has been successful.

20 One does not want to just state that  
21 we're going to restore that grassland over there,  
22 and then walk away from it and never look at it  
23 again.

24 This will provide a means for very clear  
25 and quantitative measuring points and standards to

1 be included. Therefore the entity who will be  
2 chosen to manage these mitigation areas will have  
3 those and there will be a feedback loop in a way  
4 to adaptively manage and assess and improve, to  
5 ensure success, so that if the seeds that were  
6 planted last year didn't survive the winter, well  
7 that won't be the end of the story.

8 We need to take action to ensure that we  
9 plant them again and take the necessary measures  
10 to make sure that it works. So that's what number  
11 13 requires. And this is one of those items that  
12 is not yet complete. It will be developed further  
13 in consultation with the agencies and using the  
14 best available science.

15 And actually, of course, interaction  
16 with the management entity, who has a lot of  
17 practical experience managing for these types of  
18 species.

19 HEARING OFFICER GEFTER: Well, that  
20 certainly makes sense, I'm just concerned that the  
21 language here isn't as specific as it could be,  
22 and perhaps it can be rewritten to actually  
23 reflect what you just explained? I'm not sure if  
24 this is a standard condition that staff typically  
25 includes, it may be. Off the record. Who's phone

1 is that?

2 (Off the record.)

3 HEARING OFFICER GEFTER: Back on the  
4 record. I was asking whether this was a standard  
5 condition that staff includes typically in your  
6 BRMIMP requirements?

7 MS. ERICHSON: Yes.

8 HEARING OFFICER GEFTER: Is there a way  
9 to draft it so it is actually clear and reflects  
10 what you've just explained?

11 MS. ERICHSON: I think that's possible.

12 HEARING OFFICER GEFTER: That would be  
13 very helpful, thank you. Please continue with  
14 your direct testimony.

15 MS. HOUCK: You indicated that there  
16 would be no significant adverse environmental  
17 impacts with mitigation, is that correct?

18 MS. ERICHSON: Yes that's correct.

19 MS. HOUCK: Can you describe what  
20 potential impacts, what species would potentially  
21 be impacted without mitigation?

22 MS. ERICHSON: Well, of foremost concern  
23 when staff initially evaluated the project site,  
24 the proximity to the Haera Mitigation Bank, in  
25 consultation with Fish and Game, Fish and Wildlife



1 Service, was that this area is of essential  
2 importance to the northern satellite population of  
3 the San Joaquin kit fox.

4 So that is one of the species that would  
5 be impacted by habitat loss and habitat  
6 degradation. That would affect the connectivity  
7 and the ability of the species to disperse in this  
8 part of its range.

9 Other species that were identified in  
10 staff's analysis for significant impacts included  
11 the burrowing owl, which is a state species of  
12 special concern. It is a ground-dwelling bird  
13 whose burrows -- some of which are actively being  
14 used -- would be removed by the project. So that  
15 was identified as another significant impact.

16 The third species that was identified as  
17 the California tiger salamander, which does not  
18 breed onsite, but could be present -- and there's  
19 potentially suitable habitat for it in the area,  
20 and it also estivates or over-winters in the soil.  
21 So that it could be vulnerable to crushing and  
22 take during construction activities, and it would  
23 lose estivation over-wintering habitat.

24 The California redlegged frog was  
25 analyzed by staff, in close consultation with Fish

1 and Game and Fish and Wildlife Service. Looking  
2 at known nearby populations, the likelihood that  
3 they are found in this area, the riparian habitat  
4 south of the project, which are adjacent to the  
5 construction laydown area -- and that was  
6 identified as a concern by staff -- would provide  
7 potentially suitable habitat for the California  
8 redlegged frog.

9           The staff's intent to provide strong  
10 protection for this riparian habitat during  
11 construction and operation and that no habitat for  
12 the California redlegged frog will be impacted by  
13 this project.

14           In addition, as related to the  
15 landscaping efforts for this project, which  
16 includes restoration of the naturally-occurring  
17 riparian area on Patterson Run Creek, this  
18 restoration of riparian vegetation will ultimately  
19 benefit species such as the California redlegged  
20 frog and the California tiger salamander, and  
21 other species that rely on riparian and wetland  
22 habitat.

23           So those are the impacts we were  
24 concerned with, and the impacts that we were  
25 designing and working with the agencies to look at

1 ways to mitigate those potential and known impacts  
2 sufficiently.

3 Staff was obviously concerned with  
4 construction impacts. The noise, the disturbance,  
5 the dust, the potential pollution, the traffic.  
6 Staff also identified operational noise and  
7 potential maintenance issues.

8 Staff did not want landscaping that  
9 would be very intrusive on the landscape and  
10 degrade the habitat and require maintenance that  
11 would continually disturb habitat. And staff did  
12 not want the use of herbicides or rodenticide in  
13 that maintenance, only with very, very restricted  
14 use and approval by the agencies.

15 Staff was concerned and evaluated  
16 potential impacts from collision with structures  
17 and electrocution, and evaluated those very  
18 carefully. Staff also evaluated the cumulative  
19 impacts of all of these different actions, and the  
20 habitat loss for the San Joaquin kit fox was a  
21 prime focus in this case.

22 MS. HOUCK: And you've indicated you've  
23 looked at potential impacts that would be  
24 associated with noise. Did you consult with staff  
25 at the Energy Commission conducting the section

1     entitled "noise analysis" for the FSA?

2             MS. ERICHSON:   Yes I did.

3             MS. HOUCK:   And do you believe the  
4     recommended conditions of certification in the  
5     noise section, combined with the conditions you're  
6     recommending, would mitigate any potential impacts  
7     related to noise?

8             MS. ERICHSON:   Yes they will.

9             MS. HOUCK:   And do you believe the  
10    conditions of certification that you're  
11    recommending in your testimony would mitigate the  
12    impacts associated with the other areas you've  
13    discussed -- lighting and potential avian  
14    collisions or electrocution and air pollution?

15            MS. ERICHSON:   Yes.

16            MS. HOUCK:   You earlier heard Dr.  
17    Mudry's testimony regarding potential impacts  
18    associated with air pollution.   Would you concur  
19    with the statements of Dr. Mudry?

20            MS. ERICHSON:   Yes I do concur with his  
21    statement.   And I have discussed this issue also,  
22    independently, with Fish and Game, Fish and  
23    Wildlife Service, and Wildlands Incorporated to  
24    find out if they had concerns.

25            MS. HOUCK:   You also indicated a concern

1 for potential impacts to San Joaquin kit fox. Do  
2 you believe the conditions of certification you're  
3 recommending would mitigate any impacts to that  
4 species?

5 MS. ERICHSON: Yes I do.

6 MS. HOUCK: Can you describe that  
7 proposed mitigation in a little more detail?

8 MS. ERICHSON: In addition to what Dr.  
9 Mudry already --

10 MS. HOUCK: Is there anything in  
11 addition to the testimony of Dr. Mudry that you'd  
12 like to add?

13 MS. ERICHSON: I would support the final  
14 mitigation compensation package that has been  
15 developed by the Applicant. It was a long and  
16 arduous process. Initially when we looked at this  
17 site, Fish and Wildlife Service staff was  
18 seriously pushing for evaluation of alternative  
19 sites.

20 And many of the alternative sites would  
21 have resulted in the very same types of impacts.  
22 They were not better than the existing site, and  
23 in some cases were more sensitive and worse in  
24 terms of biological impacts.

25 And so the development of this large

1 interconnected patch of habitats will secure this  
2 essential migration corridor for the San Joaquin  
3 kit fox in perpetuity. It will be actively  
4 managed for these species and protected.

5 It will be monitored and it will benefit  
6 burrowing owl and California tiger salamander and  
7 other special sized species. And it will also  
8 benefit the Haera Mitigation Bank in that it will  
9 provide adjacent habitat next to them and enhance  
10 the success of their efforts there.

11 MS. HOUCK: There was a concern raised  
12 in Dr. Smallwood's testimony about a final  
13 biological resource implementation, monitoring,  
14 and mitigation plan not being included in the  
15 conditions of certificaton. And Dr. Mudry  
16 addressed this in his testimony as well.

17 Is it your understanding also that that  
18 document that you're proposing as a condition of  
19 certification could not be finalized until after  
20 final certification by the Energy Commission?

21 MS. ERICHSON: Yes that is true.  
22 Because it will contain those final conditions of  
23 certification, and it will contain the permit that  
24 will be issued by the agencies, which are not  
25 completed yet.

1 HEARING OFFICER GEFTER: I'm sorry, what  
2 would contain?

3 MS. ERICHSON: The BRMIMP.

4 MS. HOUCK: And in the Commission's  
5 analysis and recommendation with bio 5, have you  
6 considered public comment?

7 MS. ERICHSON: Yes. The outline of the  
8 BRMIMP has been available, as Dr. Mudry mentioned,  
9 since March of 2002. The latest draft that was  
10 delivered to us in December-- I think the 16th,  
11 2002 -- has been available for public comment and  
12 we would have greatly welcomed and appreciated any  
13 comments to it. So it has been available publicly  
14 for some time now.

15 HEARING OFFICER GEFTER: Is there an  
16 exhibit that we can look at the most recent draft  
17 of the BRMIMP?

18 MS. ERICHSON: That was the exhibit that  
19 Mr. Galati --

20 HEARING OFFICER GEFTER: Exhibit 14?

21 MS. ERICHSON: Yes.

22 MR. GALATI: Actually, I believe it was  
23 exhibit 6, supplemental responses, specifically  
24 supplemental response, I believe, exhibit response  
25 40.

1 HEARING OFFICER GEFTER: So we're  
2 talking, I'm sorry then, I misidentified it. It's  
3 exhibit 6, supplemental response 40, that was  
4 offered by Applicants testimony.

5 MS. HOUCK: Yes.

6 HEARING OFFICER GEFTER: All right,  
7 thank you.

8 MS. HOUCK: And has staff held workshops  
9 to discuss biological issues associated with this  
10 project?

11 MS. ERICHSON: Yes, there have been  
12 several.

13 MS. HOUCK: Do you have any additional  
14 comments or summary of your testimony?

15 MS. ERICHSON: No I do not.

16 HEARING OFFICER GEFTER: I have a  
17 question. Again, back to bio 5. We talked about  
18 item 13, which I thought was a little bit vague.  
19 Also item 14 has the same language in it. It says  
20 "performance standards and remedial measures to be  
21 implemented if performance standards are not met."

22 So it's sort of performance standards on  
23 top of performance standards in item 14.

24 MS. ERICHSON: You're referring to bio  
25 14?



1           HEARING OFFICER GEFTER: I'm referring  
2 to bio 5, item 14. And again, I would like to see  
3 that item also rewritten or redrafted to be more  
4 specific in terms of what you're really looking  
5 for.

6           MS. ERICHSON: Staff is willing to work  
7 on that. I think the reason it's left so vague is  
8 because it applies to very site-specific  
9 conditions and factors. So we try not to be too  
10 limiting.

11           And these performance standards would  
12 apply to the landscaping construction, restoration  
13 that would apply to many different types of  
14 mitigation measures and efforts that will be going  
15 on the site over the lifetime of the project.

16           HEARING OFFICER GEFTER: Perhaps you  
17 could, rather than specify each item perhaps you  
18 could incorporate what you've just explained into  
19 the actual item 14, so that at least gives us some  
20 idea of what you're focusing on.

21           MS. ERICHSON: I will.

22           HEARING OFFICER GEFTER: I have another  
23 question, and this is just for our benefit. What  
24 do you mean by the term "estivation?"

25           MS. ERICHSON: Estivation is an

1 occurrence when a mammal or a reptile or an  
2 amphibian burrows into the soil and goes into a  
3 physiological state to basically protect itself  
4 from the environment, lowered its metabolic rate.

5 HEARING OFFICER GEFTER: Just like  
6 hibernation?

7 MS. ERICHSON: They're very vulnerable.  
8 Yes, similar to hibernation.

9 HEARING OFFICER GEFTER: Thank you. And  
10 then the other question I have, in terms of the  
11 mitigation plan that you and the Applicant have  
12 agreed upon, is this based on a particular  
13 mitigation ratio formula that is available from  
14 Fish and Game, or U.S. Fish and Wildlife, or what  
15 jurisdiction are you looking at to establish your  
16 formula?

17 MS. ERICHSON: Absolutely not. Because  
18 of the high importance of this area the Fish and  
19 Wildlife Service said early on that if this  
20 project is to go and remain in this area no ratio  
21 can apply.

22 The Tracy triangle is an area that is  
23 identified in the recovery plan for the San  
24 Joaquin kit fox, the Upland recovery plan for the  
25 San Joaquin Valley, for species in the San Joaquin

1 Valley, and also in the kit fox planning and  
2 conservation team conservation plan specifically  
3 dealing with the Tracy triangle area.

4 So this area is so valuable that no  
5 ratio was determined. And it was just a matter of  
6 looking at the habitat that were out there -- and  
7 Susan Jones can speak more to this -- but Fish and  
8 Wildlife is strategizing very actively to secure a  
9 lot of the different parcels that are adjacent, as  
10 Dwight I think mentioned earlier, adjacent to the  
11 ones that are being acquired for this project.

12 Because they really are focusing very  
13 aggressively on protecting this Tracy triangle  
14 corridor. So there was, the typical standard  
15 mitigation ratios were not applicable at all.

16 HEARING OFFICER GEFTER: So how was this  
17 mitigation plan developed then, what was it based  
18 on?

19 MS. ERICHSON: It was based on the  
20 aforementioned concerns that this habitat and this  
21 corridor must be protected by preserving the open  
22 space and managing and protecting the habitat for  
23 the species. And there were numerous interagency  
24 meetings, as well as a discussion of this project  
25 and potential priorities for acquisition in this

1 area.

2 This topic was discussed by the kit fox  
3 planning and advisory committee team, and I am a  
4 participant on that team. And the parcels were  
5 identified in terms of priority, in terms of size,  
6 in terms of location and proximity to other types  
7 of development threat going on in the area.

8 And actually the property that was  
9 finally secured by the Applicant was one of those  
10 high priority parcels that they really wanted to  
11 get their hands on.

12 HEARING OFFICER GEFTER: That who wanted  
13 to get their hands on?

14 MS. ERICHSON: The Fish and Wildlife  
15 Service, and the Fish and Game of course. Fish  
16 and Game was actively participating in this as  
17 well.

18 COMMISSIONER GEESMAN: And it's your  
19 judgment that that created a greater level of  
20 mitigation than would the mechanical application  
21 of existing ratios?

22 MS. ERICHSON: I'm not sure I  
23 understand.

24 COMMISSIONER GEESMAN: Well, you  
25 indicated that the concern was so great that you

1 and Fish and Wildlife, and presumably Fish and  
2 Game, didn't feel that application of standard  
3 ratios would be sufficient. I believe that was  
4 your testimony.

5 MS. ERICHSON: Yes, that's true.

6 COMMISSIONER GEESMAN: And so is it  
7 correct for me to conclude that, in your judgment,  
8 the mitigation which actually is to be achieved is  
9 greater than that which would have been achieved  
10 if there were simply a mechanical application of  
11 standard ratios?

12 MS. ERICHSON: Yes, in one sense that's  
13 true. But in the larger sense the mitigation and  
14 the amount of mitigation was developed and  
15 accepted because it was sufficient and it was not  
16 accepted because it was in excess of what was  
17 needed. It was what was needed.

18 COMMISSIONER GEESMAN: And how do you  
19 determine what's sufficient then?

20 MS. ERICHSON: Because it provided the  
21 habitat connectivity and the protection of a  
22 sufficient amount of land. When you're looking at  
23 all of the parcels that are surrounding this  
24 project site you'll see that some of them are  
25 slated for development, some of them are slated as

1 mitigation for other projects.

2 And so you strategize and look at what  
3 parcels still need to be protected. And so it  
4 comes down to what is available, what can be  
5 achieved, what the costs are. I mean, it can't  
6 be, you know, it has to be within a range of  
7 reasonability as far as the Applicant was  
8 concerned.

9 We were very pleased with what they were  
10 able to put together. But it was never assumed,  
11 at the beginning of the negotiations or the  
12 discussion, that something really desirable or  
13 suitable could be found. It was, if we can try to  
14 make this project be feasible here, then we need  
15 to look at how much of this habitat we can get  
16 protected to ensure protection of this corridor.

17 COMMISSIONER GEESMAN: Thank you.

18 HEARING OFFICER GEFTER: The corridor  
19 that you're referring to, is that a corridor that  
20 connects to the Haera Mitigation Bank?

21 MS. ERICHSON: It is connected to the  
22 Haera Mitigation Bank, but it is generally a  
23 quarter that protects habitats on the north side  
24 of 580 and the south side of 580. And the  
25 development and the traffic is a tremendous danger

1 to kit fox.

2 HEARING OFFICER GEFTER: How are those  
3 two habitats connected over the freeway?

4 MS. ERICHSON: Well, there are swaths of  
5 undeveloped habitat that go under the freeway, and  
6 that is part of the corridor. It's like a funnel.

7 HEARING OFFICER GEFTER: Okay. And  
8 could you quickly explain what the Haera  
9 Mitigation Bank is?

10 MS. ERICHSON: The Haera Mitigation Bank  
11 is a mitigation bank approximately 560 acres in  
12 size. It has been approved as a mitigation bank  
13 for burrowing owl. And I think as well San  
14 Joaquin kit fox. I'm not sure if the habitat  
15 management plan has been finalized.

16 Craig Bayley and Susan Jones can confirm  
17 on that. But it is essentially viewed, and for  
18 all intents and purposes seen as a mitigation bank  
19 for San Joaquin kit fox and burrowing owl.

20 HEARING OFFICER GEFTER: Is Haera an  
21 acronym?

22 MS. ERICHSON: No, Haera is the name. I  
23 think it was part of the Haera Ranch, a family  
24 name.

25 HEARING OFFICER GEFTER: How is it

1 spelled?

2 MS. ERICHSON: H-a-e-r-a.

3 HEARING OFFICER GEFTER: And where is it  
4 located in relation to the site of this project?

5 MS. ERICHSON: It is immediately south  
6 of the project site.

7 HEARING OFFICER GEFTER: But not  
8 adjacent?

9 MS. ERICHSON: It is adjacent. It's  
10 immediately bordering.

11 HEARING OFFICER GEFTER: Dr. Mudry, when  
12 you testified and we were asking about the Haera  
13 Mitigation Bank, my impression of your testimony  
14 was that it wasn't adjacent, that it's farther  
15 south?

16 MR. MUDRY: No. I think I showed you  
17 the map. And I'm not sure if that map is now  
18 available.

19 HEARING OFFICER GEFTER: In exhibit 14?

20 MR. MUDRY: Okay. And if you look at  
21 that exhibit -- is it a color copy?

22 HEARING OFFICER GEFTER: Yes.

23 MR. MUDRY: Okay, it's a slightly  
24 different color.

25 HEARING OFFICER GEFTER: Yes. And the



1 map does show that it's south --

2 MR. MUDRY: South of the site. The  
3 power plant site is approximately 60 acres, and  
4 the facility itself is within a fenced area of  
5 about 20 acres. So it has a buffer zone around  
6 the power plant which separates it. It's  
7 approximately 25.8 acres around the power plant  
8 that buffers it from all the adjacent properties.

9 HEARING OFFICER GEFTER: Does this  
10 mitigation bank exist now?

11 MR. MUDRY: Yes it does.

12 HEARING OFFICER GEFTER: And who  
13 administers it?

14 MS. ERICHSON: Wildlands Incorporated.

15 HEARING OFFICER GEFTER: Who are they?

16 MS. ERICHSON: They are a wildlife,  
17 natural resource management group that obtains and  
18 manages mitigation lands.

19 HEARING OFFICER GEFTER: And would that  
20 be a group that -- we were talking earlier, I  
21 believe it was in the land use section, where --  
22 let's go off the record for a minute.  
23 (Off the record.)

24 HEARING OFFICER GEFTER: Back on the  
25 record. I've asked staff to explain to us the

1 difference between the Wildlands Incorporated  
2 organization, and a farmland preservation  
3 organization. Ms. Allen?

4 MS. ALLEN: These resource-orientated  
5 trusts can be seen as somewhat parallel to each  
6 other. There are some counties in California that  
7 have formed their own non-profit ag land trusts.  
8 In other cases they're locally based ag land  
9 trusts that are not affiliated with a local  
10 government.

11 And then there's a statewide private entity  
12 that's a non-profit that's called the American  
13 Farmland Trust. These agriculturally oriented  
14 land trusts are separate and different from these  
15 biologically oriented trusts. I'm going to let  
16 Ms. Erichson amplify detail on the biologically  
17 oriented ones, but there is no connection,  
18 analogous.

19 HEARING OFFICER GEFTER: Thank you. Ms.  
20 Erichson -- and I'd also like Mr. Martinelli to  
21 respond as well. Go ahead with your testimony,  
22 and then pass the mike.

23 MS. ERICHSON: I'm sorry, what was the  
24 continuation on the question?

25 HEARING OFFICER GEFTER: To explain to

1 us what Wildland Incorporated is, and whether or  
2 not it's related to U.S. Fish and Wildlife  
3 Service.

4 MS. ERICHSON: Oh, okay. Yes, Wildlands  
5 Incorporated is a private, for-profit and for non-  
6 profit organization that acquires and develops  
7 mitigation banks and sells credits, so that  
8 projects can mitigate for primarily San Joaquin  
9 kit fox and burrowing owl.

10 The Haera Mitigation Bank is not a Fish  
11 and Wildlife Service refuge or a Fish and Game  
12 preserve. However, Haera Mitigation Bank, in  
13 order to become a mitigation bank for a certain  
14 species, has to be approved by Fish and Wildlife  
15 Service and fish and Game, and has submitted a  
16 habitat management plan to those agencies for  
17 review and approval.

18 So that is how they are connected and  
19 somewhat regulated or, you know, overseen by Fish  
20 and Game and Fish and Wildlife Service.

21 HEARING OFFICER GEFTER: Has it been  
22 approved?

23 MS. ERICHSON: Yes it has.

24 HEARING OFFICER GEFTER: And how long  
25 has it been in effect?

1 MS. ERICHSON: Oh, I'm not exactly sure  
2 of the date. But when we started working on this  
3 project it was already in existence and undergoing  
4 the approval process.

5 HEARING OFFICER GEFTER: And now it's  
6 actually been approved, as far as you know?

7 MS. ERICHSON: As far as I know.

8 HEARING OFFICER GEFTER: Okay, we'll ask  
9 Ms. Jones when she's here next week. Okay, Mr.  
10 Martinelli, do you have comment?

11 MR. MARTINELLI: The land trust that is  
12 proposed by Alameda County and is specified to be  
13 developed under our general plan is an open space  
14 and agricultural land trust. So it encompasses a  
15 broader responsibility than just preserving  
16 agriculture.

17 But the general plan explicitly talks  
18 about habitat protection, watershed management,  
19 flood waste, and its purposes for acquiring  
20 easements or land in addition to agriculture. In  
21 our experience, in the bulk of remaining  
22 agriculture in Alameda County is grazing land.

23 Our prime agriculture, particularly  
24 along the gateway, has all been developed. The  
25 grazing and habitat preservation are compatible.

1 And so the purpose of the trust is really to  
2 ensure permanence beyond what occurs just by  
3 zoning.

4           You know, the idea that the project site  
5 and vicinity is habitat for kit fox or for any  
6 other species that have been identified is in the  
7 context that this area is currently, and has been  
8 historically, grazed. And so there's, it puts in  
9 evidence that agriculture and habitat preservation  
10 are compatible.

11           HEARING OFFICER GEFTER: Thank you.  
12 Does staff have any more direct testimony on this?

13           MS. HOUCK: Just to clarify, I wanted to  
14 go back to the kit fox mitigation and the parcel  
15 that was referred to earlier. Can you tell me how  
16 many acres of land total that the Applicant is  
17 going to be putting into a habitat conservation  
18 easement under -- and I think Dr. Mudry indicated  
19 this earlier.

20           MS. ERICHSON: Yes. Approximately 466.

21           MS. HOUCK: And is there a standard  
22 ratio that's typically applied for mitigation to  
23 species, such as San Joaquin kit fox?

24           MS. ERICHSON: Historically, but that is  
25 changing. But, so, I'm really, I would --

1 MS. HOUCK: But there is a standard  
2 ratio?

3 MS. ERICHSON: There can be.

4 MS. HOUCK: Okay. Now the 470 acres the  
5 Applicant will be mitigating here, is that more or  
6 less of what the typical standard ratio is?

7 MS. ERICHSON: It is more. Particularly  
8 when you look at the habitat impacts.

9 MS. HOUCK: Is it significantly more?

10 MS. ERICHSON: Yes.

11 MS. HOUCK: So you believe the  
12 mitigation proposed in your testimony would  
13 provide significantly more protection to the kit  
14 fox than if the standard ratio had been applied?

15 MS. ERICHSON: Yes.

16 MS. HOUCK: Okay, thank you. Staff has  
17 no further questions at this time.

18 HEARING OFFICER GEFTER: Okay. Do you  
19 want to move your exhibit?

20 MS. HOUCK: Staff would request that  
21 exhibit 51, the biological resource section, be  
22 moved into evidence, as well as exhibit 52, the  
23 biological resource section.

24 HEARING OFFICER GEFTER: Do you also  
25 want to move 58, or do you want to wait for that?

1 MS. HOUCK: I'd like to wait for 58,  
2 until Ms. Jones is available next week, as that  
3 issue is being deferred at this time.

4 HEARING OFFICER GEFTER: Any objection  
5 to the exhibits that staff wants to offer into the  
6 record?

7 MR. GALATI: No objection.

8 MR. BOYD: What are the exhibits again?

9 MS. HOUCK: Exhibit 51, the final staff  
10 assessment, the biological resource section, and  
11 exhibit 52, the first addendum to the final staff  
12 assessment, the biological resource section. All  
13 other biological resource exhibits will be  
14 deferred until the 18th when Ms. Jones will be  
15 available.

16 MR. BOYD: Yes, I have no objections.

17 MR. SARVEY: I have no objection.

18 HEARING OFFICER GEFTER: The exhibits  
19 that Ms. Houck has referred to related to  
20 biological resources, which incorporates staff's  
21 written testimony, are now received into the  
22 record.

23 And then you will defer any other  
24 exhibits that you have identified until the  
25 testimony of the U.S. Fish and Wildlife Services

1 representative Ms. Jones.

2 MS. HOUCK: That is correct. We would  
3 also ask that any other issues relevant to the  
4 biological opinion that would be appropriate for  
5 Ms. Jones be also left open for discussion at that  
6 time as well.

7 HEARING OFFICER GEFTER: That's fine.  
8 Now, we're going to ask the Intervenor's to  
9 present their direct testimony. Before we do  
10 that, off the record.  
11 (Off the record.)

12 HEARING OFFICER GEFTER: Back on the  
13 record. We're going to allow Mr. Sarvey to cross-  
14 examine Mr. Martinelli so that he can leave.

15 MR. SARVEY: Mr. Martinelli, can you  
16 describe the county's policies on agricultural  
17 preserves, laws, ordinances, regulations, that  
18 might affect this project.

19 MR. MARTINELLI: Well, the basic  
20 policies are contained within our general plan.  
21 The general plan has two sections which pertain to  
22 the territory around which the power plant is  
23 proposed to be sited. And there's policies  
24 pertaining to agriculture and to resource  
25 protection areas.



1 HEARING OFFICER GEFTER: Mr. Martinelli,  
2 could you speak directly into the mike please?

3 MR. MARTINELLI: Sure. There are  
4 sections involving maybe 20 policies or so. Four  
5 or five pages of the general plan dealing with  
6 agriculture and resource preservation. They, none  
7 of them preclude consideration of a power plant,  
8 but they do have affirmative recommendations for  
9 mitigation, for preservation of agriculture for  
10 protection of assets.

11 HEARING OFFICER GEFTER: Does that  
12 conclude the questions for Mr. Martinelli?

13 MR. SARVEY: Yes.  
14 (Off the record.)

15 HEARING OFFICER GEFTER: Back on the  
16 record. Mr. Martinelli is now excused. Thank you  
17 very much for your time today. We appreciate your  
18 being here to assist us. Now we're going to go on  
19 to direct testimony of the Intervenor's witness,  
20 Mr. Smallwood. And we'll have the witness sworn  
21 please.  
22 Whereupon,

23 SHAWN SMALLWOOD  
24 was called as a witness herein, and after first  
25 having been duly sworn, was examined and testified

1 as follows:

2 MR. BOYD: Dr. Smallwood, would you  
3 please state your name for the record, spell it,  
4 and state your qualifications?

5 MR. SMALLWOOD: My name is Shawn  
6 Smallwood, S-h-a-w-n S-m-a-l-l-w-o-o-d. My  
7 qualifications, I have a Masters Degree and a  
8 PH.D. in ecology from UC Davis. I spent four  
9 years as a post-graduate researcher in the  
10 environmental science department at UC Davis.

11 Since then I've been a consultant, and a  
12 contract researcher, and an expert witness on a  
13 variety of issues. And have been academically  
14 involved -- publishing papers and presenting  
15 papers.

16 Also I was the Chair of the Conservation  
17 Affairs Committee at the Wallace site for two  
18 years, and on the editorials board for a couple of  
19 journals, and have served as editor in the past,  
20 or associate editor.

21 MR. BOYD: And this document entitled  
22 "assessment of environmental review documents  
23 prepared for the Tesla Power Project," dated  
24 August 29th, 2003, which is referred to as exhibit  
25 103, is this your prepared testimony, and do you

1 have any changes or additions at this time?

2 MR. SMALLWOOD: What you have in your  
3 hand is my testimony, and I have no changes.

4 MR. BOYD: Now could you briefly  
5 describe your findings upon review of the  
6 documents prepared for this project, and give a  
7 brief description of that, and then I'll follow up  
8 with some specific questions.

9 MR. SMALLWOOD: You want me to give a  
10 brief description of a 31 page document?

11 MR. BOYD: Just a brief one, yes. Keep  
12 it down to a couple of minutes.

13 MR. SMALLWOOD: Well, I reviewed the  
14 final staff assessment, and that's all I had  
15 available to me. And I found it to be inadequate  
16 in some respects, especially when it comes to  
17 mitigation impact assessment.

18 MR. BOYD: And in your testimony you  
19 stated that you were unable to review the  
20 biological resource mitigation implementation and  
21 monitoring program. Have you at this time  
22 received a copy of that?

23 MR. SMALLWOOD: No, I never received a  
24 copy of the BRMIMP. I had asked last year at the  
25 East Altamont Energy Center, I asked staff to keep

1 me included in the loop on that, and I never heard  
2 about the BRMIMP being available. In fact, I  
3 asked for the BRMIMP for the East Altamont Energy  
4 Center at that time, and I was told by staff --

5 HEARING OFFICER GEFTER: I'm sorry, Dr.  
6 Smallwood, we're here on the Tesla Project.

7 MR. SMALLWOOD: I know, but I've only  
8 received the BRMIMP one time in the past. I had a  
9 difficult time getting this document from the CEC,  
10 that's my point.

11 HEARING OFFICER GEFTER: Okay, well it  
12 has been docketed, it's exhibit 6.

13 MR. BOYD: He doesn't know.

14 HEARING OFFICER GEFTER: I'm asking the  
15 Applicant.

16 MR. GALATI: The supplemental responses  
17 to data request number 40, which was docketed and  
18 served on all the parties. Dr. Smallwood is not a  
19 party, but it was served on the parties.

20 HEARING OFFICER GEFTER: So the  
21 Intervenor's would have gotten copies of it.

22 MR. SARVEY: I've never seen it.

23 MR. BOYD: Because it goes back to June,  
24 or July --

25 HEARING OFFICER GEFTER: Okay, off the

1 record.

2 (Off the record.)

3 HEARING OFFICER GEFTER: Back on the  
4 record. The Applicant has provided a copy of the  
5 BRMIMP, an updated version that was made available  
6 -- when was that again, Mr. Galati?

7 MR. GALATI: December of 2002.

8 HEARING OFFICER GEFTER: '02. Okay.  
9 And Dr. Smallwood has indicated that he has never  
10 seen this before, and at this point feels he  
11 cannot comment on it until he has an opportunity  
12 to review it.

13 In the meantime I'll ask that the  
14 Intervenor go forward with the remainder of your  
15 direct testimony, and then we'll take a break and  
16 ask Dr. Smallwood to take a look at the BRMIMP.

17 MR. BOYD: Certainly. I would note,  
18 though, that I was an Intervenor during that  
19 December 2002, and I never did receive a copy of  
20 this. So, my next question is, could you give me  
21 a brief assessment of the sufficiency of the final  
22 staff assessment as an informative document for  
23 the public to provide meaningful and informed  
24 participation?

25 MR. SMALLWOOD: Well, there are a number

1 of problems with it. One is the use of  
2 uncertainly terms in characterizing conclusions,  
3 contrary to what we typically do in our business  
4 as biologists.

5 For example, whether a species is  
6 present is sometimes expressed with doubt. It may  
7 be, or there is potential for the species to  
8 occur. That's contrary to the Natural Resource  
9 Council's precautionary principle, where we assume  
10 that if the habitat is present the species is  
11 there.

12 It may not be there before us when we go  
13 out and do a site visit, but we don't write it  
14 off. We assume it's there, as a more prudent  
15 approach to take. So I found the uncertainly  
16 terms to be a problem. They were applied  
17 backwards in my opinion.

18 In fact, when there are conclusions  
19 about no impact from various causes like pollution  
20 or like noise, oftentimes the logic used was well,  
21 we don't have any evidence of a cause and effect  
22 relationship, therefore there is no impact. And  
23 again, that's completely contrary to what we do in  
24 science, it's not scientific. So that's one  
25 problem.

1           Another problem is that there is a lot  
2 of knowledge out there about the biological  
3 setting amongst biologists who work out there.  
4 And this knowledge was not tapped very well at  
5 all. I don't know of anybody I work with out  
6 there that's been interviewed by the CEC staff  
7 about what's out there.

8           You go into NDDB, or the Fish and Game  
9 Department, or the U.S. Fish and Wildlife Service  
10 for a special staff species search it's  
11 inadequate, really. Those records only include  
12 what's being reported. And it's not based on  
13 scientific searches. So it's incomplete, and we  
14 have scientists and biologists in this field in  
15 California, and we have repeatedly said this is  
16 the case.

17           These kind of assessments should not be  
18 based on the presence or absence of NDDB records.  
19 A better way to go is to talk to biologists who  
20 are working in an area like this, determine  
21 whether or not there is a habitat in the area, and  
22 assume the species are there and then deal with  
23 it.

24           MR. BOYD: Could you describe in  
25 specific detail some of the inadequacies in the

1 description of the environmental setting for the  
2 project?

3 MR. SMALLWOOD: Well, can you give me  
4 some --

5 MR. BOYD: Specifically, in your  
6 testimony you spoke of redlegged frog, California  
7 tiger salamander, and you also talked about some  
8 unidentified species of fairy shrimp nearby?

9 MR. SMALLWOOD: Okay, sure. Under a  
10 natural renewable energy life contract, some  
11 colleagues of mine and myself were out there  
12 working in that area, all around the project site  
13 for what, the last five years. We found lots of  
14 California redlegged frogs in the area.  
15 California tiger salamanders --

16 HEARING OFFICER GEFTER: May I  
17 interrupt, Dr. Smallwood?

18 MR. SMALLWOOD: Yes.

19 HEARING OFFICER GEFTER: You said that  
20 you've been out to the site?

21 MR. SMALLWOOD: Yes.

22 HEARING OFFICER GEFTER: For five years?

23 MR. SMALLWOOD: In that area, yes.

24 HEARING OFFICER GEFTER: In what  
25 capacity?



1           MR. SMALLWOOD: Working on the wind  
2 turbines. The natural renewable energy lab.

3           HEARING OFFICER GEFTER: Okay, thank  
4 you.

5           MR. SMALLWOOD: So, anyway, we found  
6 these species all over the place out there. It's  
7 a nice little refuge of them. I'm sorry?

8           HEARING OFFICER GEFTER: Which species  
9 are you referring to?

10          MR. SMALLWOOD: California tiger  
11 salamander and redlegged frog. And this last year  
12 we found temporary pools in rocks which are not  
13 addressed by the final staff assessment. These  
14 temporary pools have fairy shrimp in them. We saw  
15 the fairy shrimp, we just don't know what species  
16 they are.

17          But they deserve a good look from U.S.  
18 Fish and Wildlife Service or somebody who has a  
19 permit to go and work with fairy shrimp. I  
20 wouldn't write off endangered species of fairy  
21 shrimp because there's no vernal pools in the  
22 area. There are these temporary ponds out there.

23          MR. BOYD: Could you narrow down "out  
24 there?"

25          MR. SMALLWOOD: No, I'd have to go and

1 look at my special data file. Out there, I can  
2 tell you that out there means to the south of the  
3 site --

4 MR. BOYD: How far?

5 MR. SMALLWOOD: About two miles, less  
6 than two miles, maybe a mile, a mile or two miles.  
7 And also to the west of the site.

8 MR. BOYD: How far?

9 MR. SMALLWOOD: Couple of miles. And to  
10 the -- I already said the south and west, also to  
11 the north of the site.

12 MR. BOYD: How far?

13 MR. SMALLWOOD: A couple of miles.

14 MR. BOYD: Okay, so in your professional  
15 opinion do you believe the impact assessment  
16 performed by staff was adequate?

17 MR. SMALLWOOD: Well, no. You know, I  
18 think it's better put in my written testimony. I  
19 don't think it was adequate. The uncertainly  
20 terms were inappropriately used. You know --

21 HEARING OFFICER GEFTER: What terms were  
22 inappropriately used?

23 MR. SMALLWOOD: Well, for example terms  
24 like "might be" or "potentially occur." These  
25 kinds of things. Also I want to point out that

1 the uncertainty terms related to the cause and  
2 effect relationships.

3 If there was no, if it was difficult to  
4 identify cause and effect relationship it was  
5 basically written off in the staff report. And  
6 that's why the use of uncertainly was  
7 inappropriate.

8 But you know, these things, this  
9 literature was raised in the staff report on the  
10 impacts of atmospheric pollutants on these  
11 species. But then for some reason I cannot  
12 understand it was dismissed.

13 So, according to the staff report, there  
14 is no impact from atmospheric pollution or noise  
15 or light. In fact, in the staff report it is  
16 cited, a reference is cited that noise in excess  
17 of 60 DBA is a problem for wildlife. That's going  
18 to be the case out here on the Haera Conservation  
19 Bank and elsewhere.

20 And yet the conclusion in the end of the  
21 FSA is no impact. I don't understand it. So yes,  
22 I found some problems with the impact assessment.

23 MR. BOYD: Okay, let's talk a little bit  
24 about mitigation banks. First, do you believe  
25 that a power plant is compatible with a wildlife

1 preserve?

2 MR. SMALLWOOD: No, I don't think that's  
3 compatible. I mean, I don't think you need an  
4 expect up here to tell you that a power plant is  
5 going to be a problem for wildlife right next door  
6 to it.

7 I live in a residential area next to a  
8 wildlife pond in Davis. And I've been living  
9 there for, what, eight years. The only special  
10 status species I've ever seen there is a  
11 whitetailed kite flying overhead. They don't come  
12 to places like that, next to urban areas or next  
13 to industrial facilities.

14 I've also done biological assessments  
15 around industrial facilities. And sometimes I  
16 find special status species next to the industrial  
17 facility, and sometimes I don't. The one thing we  
18 have found next to industrial facilities that emit  
19 atmospheric pollution is that they are  
20 contaminated with the pollution.

21 They are receiving it, they are  
22 breathing it, we know that. I found it.  
23 Burrowing animals, like gophers and ground  
24 squirrels, become infected with whatever's coming  
25 out of those stacks next to the facility or from

1 the facility.

2 So we know that's happening. What  
3 effect that's having on the species, yes, we don't  
4 know that. But it would be prudent to assume that  
5 it's not good. So I can assume that Haera  
6 Conservation Bank and other lands around this  
7 power plant is going to be affected. The species  
8 there are going to be exposed to the effluent  
9 24/7. Also exposed to the light and the noise.  
10 It can't be a good thing for wildlife next to this  
11 power plant.

12 MR. BOYD: I have a specific question.  
13 I have exhibit 80. It's a letter sent to Ms.  
14 Erichson of the Commission from a Ms. Sue Orloff,  
15 Principle EBIS Environmental Inc. I was wondering  
16 if you had seen this letter?

17 MR. SMALLWOOD: I just saw it, yes.

18 MR. BOYD: Do you agree with her  
19 statement that the value of the current and  
20 proposed mitigation sites in this area will be  
21 greatly devalued as a result of this development?

22 MR. SMALLWOOD: I absolutely agree with  
23 her, yes. There is a good reason why kit fox have  
24 big ears on their head. It's because they rely a  
25 lot on auditory perception. They hear their prey

1 as they walk through their habitat during the  
2 night.

3 And I can't imagine that a noisy power  
4 plant is going to be helpful in that regard for a  
5 kit fox trying to use the Haera Conservation Bank  
6 right next door.

7 I could also say something about the kit  
8 fox. You know, my career has been out there for  
9 five years, and we've spent a lot of time in the  
10 area, and we have not seen kit fox during that  
11 time period.

12 And we should have seen them, because  
13 they were there eight years ago in the area. We  
14 had no indent (sp) sites in that area, seven or  
15 eight of them. I think the ongoing activities  
16 have been severe on the kit fox, including the  
17 road control programs out there that are performed  
18 by Alameda County.

19 And I think this project needs to be  
20 considered in that context. The kit fox is right  
21 on the brink, if not already extinct in the area.  
22 And this power plant certainly is going to  
23 contribute to that. If they are not extinct they  
24 may go extinct with this thing. Go ahead.

25 MR. BOYD: Okay. I was going to ask if

1     you could, you provided several figures in your  
2     testimony that had to deal with the impact of  
3     atmospheric pollutants on resources.

4             And I was wondering if you could take  
5     some time to explain some of these figures, so  
6     that the other parties have a better understanding  
7     of what they mean, and how they are relevant to  
8     this project?

9             MR. SMALLWOOD:  What I did was I went to  
10    the CEC website and I downloaded documents,  
11    environmental documents on power plants all over  
12    California being proposed or already have been  
13    permitted.

14            And I looked at their levels of  
15    pollution generation, tons per year, and I looked  
16    at their water use.  And I related that to the  
17    size of the power plant.  You know, the number of  
18    megawatts generated by the power plant.

19            So you get basically a plot.  What I did  
20    was generate scatter plots of the production of  
21    pollutants or the use of water against the number  
22    of megawatts.  So you can see the relationship.  
23    As the number of megawatts increases you get some,  
24    you know, increase in whatever that pollutant  
25    might be, or the water use.

1           And from these graphs you can see,  
2   basically, the context in which the Tesla Power  
3   Project sits. You can see how much generation per  
4   megawatt it's going to produce versus some other  
5   power plant n California.

6           So it's a good way to kind of compare  
7   order of magnitude, and what's going to be  
8   realized by this power plant, versus for example  
9   -- the trend among power plants. Also versus the  
10   minimum permitted levels at other power plants.  
11   You can look for kind of the low values of some  
12   effluent tons per year versus megawatts.

13           So you can actually draw a line between  
14   the lowest values. And that's your minimum  
15   permitted levels. I would assume that means those  
16   levels are feasible, because they have been  
17   permitted by the CEC elsewhere in California. So  
18   you can compare the level from the Tesla Power  
19   Project to that as well.

20           You could also compare the level of the  
21   Tesla Power Project to what would be emitted or  
22   estimated to be emitted with the use of SCONOX  
23   technology. So you can kind of compare levels of  
24   impacts of the Tesla Power Project to what is  
25   feasible at two different levels.



1           MR. BOYD:  So what was your finding in  
2   regard to Tesla?  Is it above the line, below the  
3   line?

4           MR. SMALLWOOD:  For some things it's  
5   above the line, from some things its actually  
6   right on the line.  For example water use is well  
7   above the line.

8           MR. BOYD:  And ammonia obviously it  
9   would be --

10          MR. SMALLWOOD:  I don't remember, I'd  
11   have to look.

12          MR. BOYD:  You had several graphs there.  
13   If you could point to ones where you saw some --

14          MR. SMALLWOOD:  NOX is right in the zone  
15   for NOX.  Essentially --

16          MR. BOYD:  For SCR's?

17          MR. SMALLWOOD:  Yes, for SCR.  It's  
18   actually above what you could get from SCONOX.  
19   Ammonia slip is well above what's permitted  
20   elsewhere in California.  It's also well above  
21   what you'd get from SCONOX.

22          PM-10, again, it's -- I can't tell from  
23   this graph, I need my color graphs -- VOC's, it's  
24   right on the, what's been permitted is kind of the  
25   low side of what's been permitted in California,

1 but it's above feasible levels for SCONOX.

2 HEARING OFFICER GEFTER: Okay. Let me  
3 interrupt here to find out what the purpose of  
4 this line of questioning is, and what your  
5 conclusion is?

6 MR. BOYD: Basically your conclusion is  
7 that this plant is the best available, or there's  
8 more appropriate mitigations that would better,  
9 you know --?

10 MR. SMALLWOOD: My conclusions based on  
11 these graphs is that, even using SCR the plant  
12 could do better. It could be a less harmful  
13 project to the environment. And with SCONOX it  
14 would be a whole lot better. That's my  
15 conclusion.

16 HEARING OFFICER GEFTER: Can you be more  
17 specific?

18 MR. SMALLWOOD: Well, it would be easier  
19 in terms of water use. If they used dry cooling,  
20 for example, it would be a less harmful project to  
21 the environment. If they used SCONOX it would  
22 generate less NOX, less ammonia slip, less of most  
23 of the pollutants.

24 MR. BOYD: Could you maybe go into more  
25 detail about -- for example, you just said that it

1 would be less impact for dry cooling -- or is that  
2 too much?

3 HEARING OFFICER GEFTER: You know, I  
4 think that we'll discuss that under the topic of  
5 water. I think that we need to limit the  
6 testimony at this point to impacts on biological  
7 resources. And we need to get Dr. Smallwood's  
8 conclusions in more specificity on those  
9 conclusions.

10 MR. BOYD: Okay. I was going to ask him  
11 a couple more questions, and wrap it up. Is there  
12 anything that you wanted to add then to what you  
13 already said on the light and noise pollution?

14 MR. SMALLWOOD: I don't think so.

15 MR. BOYD: Now, how about cumulative  
16 effects? Did you want to talk a little bit -- I  
17 know that you were involved in Altamont project as  
18 well as an expert, and --

19 MR. SMALLWOOD: Yes, well, cumulative  
20 effects. There's a lot of things going on in the  
21 area. There's species there getting hammered,  
22 basically. I mean, this will be the third power  
23 plant in the area. We're talking about, what,  
24 2,700 megawatts or so of power production from  
25 gas-fired power plants in the region.

1           There's a wind farm which is killing a  
2 lot of birds. The reports are just now coming in  
3 on that. The numbers are staggering. Then we  
4 have a lot of power poles out there to service the  
5 wind farm. And these power poles are also  
6 dangerous, we're finding electrocuted birds.

7           There's a lot of things going on out  
8 there, and they weren't addressed in the final  
9 staff assessment. This power plant's just going  
10 to add to those impacts. We need to take, I  
11 think, a broader look at what's going on out  
12 there. It's a sensitive area.

13           In fact, I remember, for the Metcalf  
14 Energy Center I was hired as an expert and the CEC  
15 staff asked me if the project alternative for the  
16 Metcalf Energy Center, one of the alternatives was  
17 Tesla, the Tesla site. She asked me if that was  
18 going to be a worse site, biologically, I mean  
19 would you rather this power plant, instead of  
20 going here, would you rather it go to the Tesla  
21 power project.

22           And I agreed with her, no, it's a more  
23 biologically sensitive site. And here we have it,  
24 a power project coming here. It is a sensitive  
25 site. There's a lot of things going on out there,

1 and the cumulative impacts are not being addressed  
2 here. There's even a proposal for a highway to  
3 cut through the Altamont hills to the south of the  
4 project.

5 MR. BOYD: So my final question is, in  
6 your professional opinion, is the mitigation being  
7 offered up by the Applicant and staff adequate to  
8 mitigate the impacts on biological resources?

9 MR. SMALLWOOD: No. I mean, the  
10 conservation easements are on property immediately  
11 surrounding the power plant. They're all going to  
12 be affected, this land is going to be affected  
13 most intensively by the power plant. The staff  
14 report itself says that the power plant is going  
15 to be a dispersal barrier to kit fox.

16 So why would we put the conservation  
17 easements right next to the power plant. I mean,  
18 it's mystifying to me. Also, you know, I've been  
19 involved with other projects elsewhere, so I know  
20 what level of mitigation we get. Basically  
21 impacts are based on the amount of money involved.

22 And I've got direct experience, in fact  
23 I've been a litigant in the past. I did a CEQA  
24 lawsuit myself. We get a lot more mitigation for  
25 the impacts and for the dollars involved from

1 housing developers than I've seen here. I mean, a  
2 lot more.

3 HEARING OFFICER GEFTER: Let me  
4 interject here. If you want to offer up what  
5 mitigation measures you would prefer to see here,  
6 could you summarize that very quickly here?

7 MR. SMALLWOOD: They are summarized in  
8 my report.

9 HEARING OFFICER GEFTER: Okay, then  
10 we'll read your report. Thank you.

11 MR. SMALLWOOD: Very good.

12 MR. BOYD: Okay, that's all my  
13 questions.

14 HEARING OFFICER GEFTER: Okay, thank  
15 you. Is there any cross-examination of Dr.  
16 Smallwood from the Applicant?

17 MR. GALATI: Yes, thank you. Dr.  
18 Smallwood, have you reviewed the Application for  
19 Certification in this case?

20 MR. SMALLWOOD: Yes, some time back,  
21 yes.

22 MR. GALATI: Did you specifically look  
23 at appendix J4, which is a list of the species  
24 that were going to be surveyed?

25 MR. SMALLWOOD: I don't recall.

1           MR. GALATI: Are you aware that U.S.  
2 Fish and Wildlife Service and Fish and Game  
3 approved that list of species?

4           MR. SMALLWOOD: No.

5           MR. GALATI: Are you aware that the  
6 wildlands Incorporated optioned -- who manage the  
7 Haera Bank -- optioned the property to the Tesla  
8 Power Project?

9           MR. SMALLWOOD: I'm aware of that.

10          MR. GALATI: No further questions.

11          HEARING OFFICER GEFTER: Anything else?

12          MR. GALATI: No further questions from  
13 the Applicant.

14          HEARING OFFICER GEFTER: Okay. Off the  
15 record.

16          (Off the record.)

17          HEARING OFFICER GEFTER: Back on the  
18 record. Does staff have cross-examination of Dr.  
19 Smallwood?

20          MS. HOUCK: Just very brief. Dr.  
21 Smallwood had indicated that he was out at the  
22 site with the wind turbines. Are there any wind  
23 turbines on the site?

24          MR. SMALLWOOD: No, but right next to  
25 it.

1 MS. HOUCK: And right next to it would  
2 be -- by right next to it you would mean the  
3 distances that you stated earlier when  
4 Commissioner Geesman asked --

5 MR. SMALLWOOD: Those distances involved  
6 are even closer. There's a bunch of Seawest  
7 turbines just across the street, to the east.

8 MS. HOUCK: Okay. And when you talked  
9 about potential impacts related to transmission  
10 lines that are already existing at the facility,  
11 how will -- do you know how many T lines the  
12 Applicant is proposing to add to what's out there  
13 currently?

14 MR. SMALLWOOD: How many transmission  
15 lines?

16 MS. HOUCK: If any?

17 MR. SMALLWOOD: I know that there's some  
18 being added, but I don't remember the number or  
19 the length.

20 MS. HOUCK: Okay. Have you reviewed the  
21 maps looking at the interconnection between the  
22 power plant and the Tesla substation?

23 MR. SMALLWOOD: You're asking me if I  
24 looked at the what, I'm sorry?

25 MS. HOUCK: Did you review the layout of



1 the facility design that would indicate how many  
2 if any new poles would be put out in the area?

3 MR. SMALLWOOD: Yes I have, but I just  
4 don't remember how many miles of transmission  
5 line, or how many transmission towers.

6 MS. HOUCK: And when you discuss  
7 potential impacts associated with electrocution to  
8 species, did you consider the design of the wires  
9 as compared to older wires that may be existing  
10 associated with wind facilities?

11 MR. SMALLWOOD: When I addressed the  
12 electrocutions I'm talking about existing  
13 distribution poles. They're ongoing impacts,  
14 those are cumulative impacts. So when I'm talking  
15 about transmission towers I'm talking about what's  
16 going to be put up for this project.

17 And then when I'm talking about perc (?)  
18 sites for rafters that could be a problem for kit  
19 fox, I'm talking about the possibility for strikes  
20 with transmission lines, and not electrocutions.

21 MS. HOUCK: Okay, because there was a  
22 reference. One second. And just, you referenced  
23 a letter that was sent by Sue Orloff. Was that  
24 letter dated September 30th, 2002?

25 MR. SMALLWOOD: Yes it is.

1 MS. HOUCK: Was that letter submitted to  
2 the Commission prior to the mitigation proposal  
3 being recommended and the staff assessment being  
4 developed?

5 MR. SMALLWOOD: I don't know.

6 MS. HOUCK: And you made a reference  
7 regarding potential air impacts that -- and this  
8 is paraphrasing -- they're breathing this stuff in  
9 and you found it. Can you state what you found?

10 MR. SMALLWOOD: I said that? When?

11 MS. HOUCK: You made a reference that "I  
12 found it." You said that they were breathing this  
13 stuff in --

14 MR. SMALLWOOD: Oh, my description of my  
15 bioanalysis by other facilities? Is that what  
16 you're referring to?

17 MS. HOUCK: No. It was a reference to  
18 air pollution impacts to species.

19 MR. SMALLWOOD: Yes, I was talking about  
20 my work with other facilities, not this one.

21 MS. HOUCK: What was the stuff that you  
22 found?

23 MR. SMALLWOOD: Radio nucleolites.

24 MS. HOUCK: Is this project going to be  
25 producing any radio nucleolites?

1           MR. SMALLWOOD: No, but it's pollution,  
2   and it's going to go airborne. And if an animal  
3   next to a facility that's generating radio  
4   nucleolites will breathe them into their bodies,  
5   we've found that, I would assume that they also  
6   are going to breathe in NOX and PM-10 and VOC's.  
7   What's the difference?

8           MS. HOUCK: You don't see a difference?

9           MR. SMALLWOOD: Oh, there might be a  
10   difference in, for example, biological half life.  
11   There might be a difference in the amount of  
12   material that actually goes to the lungs.

13          MS. HOUCK: But do you believe that --  
14   in the testimony Ms. Erichson gave some estimates  
15   of what were acceptable standards from U.S. Fish  
16   and Wildlife Service. Do you accept that those  
17   charts that she put in here are consistent with  
18   acceptable standards from U.S. Fish and Wildlife  
19   Service in the staff assessment?

20          MR. SMALLWOOD: As far as I know, yes.

21          MS. HOUCK: And you had cited a number  
22   of studies in your testimony that referenced  
23   several species. Are any of those species located  
24   on the site, on the Tesla Power Project site?

25          MR. SMALLWOOD: Which species are you

1 talking about?

2 MS. HOUCK: You referenced a number of  
3 articles associated with potential impacts to  
4 different species. Are any of the species  
5 discussed in those articles found at the Tesla  
6 Power Project site?

7 MR. SMALLWOOD: Oh, I'd have to look.  
8 American Crow yes, I remember that. But I'd have  
9 to look at the list of species, I don't remember.  
10 But I wasn't trying to indicate or imply that  
11 those species are going to occur at the power  
12 plant site.

13 I'm just saying that these are impacts  
14 that we know of, from light and noise, on  
15 biological species. Which are related in many  
16 cases to the species that are out there.

17 MS. HOUCK: And you referenced impacts  
18 associated with residential development several  
19 times. Is there a difference between potential  
20 impacts associated with residential development  
21 and the setting and the development of the  
22 proposed Tesla Power Project?

23 MR. SMALLWOOD: I'm sure there are some  
24 differences, but trying to quantify the  
25 differences is difficult. Again, we're in an area

1 of uncertainty. So in some cases it's going to be  
2 very similar, in other cases not at all.

3 MS. HOUCK: Okay, and just one other  
4 question. You expressed concerns regarding  
5 staff's uncertainty language in the staff  
6 assessment regarding "may" and "potentially."

7 MR. SMALLWOOD: Yes.

8 MS. HOUCK: In reading the staff  
9 assessment, when the staff refers to "potential"  
10 and "may", did they assume that those species  
11 would be there, or did they just disregard the  
12 species?

13 MR. SMALLWOOD: The species are part of  
14 the assessment. But there's -- I get the  
15 impression from reading it, and if I'm possibly  
16 the decision-maker I also get this impression,  
17 that there's a low likelihood the species are  
18 going to be affected by the project.

19 MS. HOUCK: But staff considered the  
20 potential impacts to those species, that  
21 potentially could have been, that potentially may  
22 be located at the site.

23 MR. SMALLWOOD: In a sense, but the --  
24 but then staff concluded that there's no impacts,  
25 basically to the project.

1 MS. HOUCK: But they considered  
2 potential impacts to those species?

3 MR. SMALLWOOD: Yes.

4 MS. HOUCK: Thank you.

5 HEARING OFFICER GEFTER: Thank you.

6 That concludes the cross-examination of Dr.

7 Smallwood. At this point I had indicated you

8 could cross-examine Applicant or staff witnesses.

9 Mr. Sarvey, you had some questions?

10 MR. SARVEY: Yes, I had a few.

11 HEARING OFFICER GEFTER: Okay. It's

12 your turn to ask the questions. And do you want

13 to move your exhibits into the record before we do

14 that?

15 MR. BOYD: Certainly. Which is exhibit

16 103.

17 HEARING OFFICER GEFTER: All right. You

18 also referenced exhibit 80?

19 MR. BOYD: Yes, exhibit 80, that's

20 correct.

21 HEARING OFFICER GEFTER: Any objections

22 to exhibits 80 or 103?

23 MS. HOUCK: No objection.

24 MR. GALATI: No objection.

25 HEARING OFFICER GEFTER: Okay. Exhibits

1 80 and 103 are now received to the record. Mr.  
2 Boyd, why don't you ask your cross-examination  
3 questions, and then we'll have Mr. Sarvey ask his  
4 questions.

5 MR. BOYD: First, my -- I guess this is  
6 the appropriate time to figure out what this  
7 exhibit 14 is all about, is that correct? I'm  
8 looking at what was provided to us, and it appears  
9 that we have -- okay, this is dated, this is a  
10 letter, "closed filing, the California Energy  
11 Commission, confidential draft, biological  
12 mitigation proposal, and figure 3.1."

13 And all these attachments were provided,  
14 I assume, in January, to the Commission?

15 MR. MUDRY: Yes they were.

16 MR. BOYD: And this is when it was  
17 confidential treatment, at that time?

18 MR. MUDRY: At that time, yes.

19 MR. BOYD: And then this document here  
20 has handwriting on the top. It says "sent by  
21 Scott B., 8/24/03" and then it says "September  
22 2003". Can you clarify when this was docketed?

23 HEARING OFFICER GEFTER: Let me ask it  
24 for you.

25 MR. BOYD: Yes.

1 HEARING OFFICER GEFTER: Let's identify  
2 this document. Is this part of exhibit 14?

3 MR. GALATI: It really is not part of  
4 exhibit 14. It provides some clarification by  
5 modifying exhibit 14 in reference to staff's  
6 assessment, where they said they needed additional  
7 detail on the habitat mitigation plan.

8 HEARING OFFICER GEFTER: Okay. Let's  
9 identify this exhibit as 14A. Okay?

10 MR. BOYD: That's great.

11 HEARING OFFICER GEFTER: And this  
12 exhibit 14A is entitled "draft habitat management  
13 plan", and it's dated September 2003, and it's  
14 sponsored by the Applicant.

15 MR. GALATI: Ms. Gefter, I do appreciate  
16 that they've got that document today. And I'd be  
17 more than happy to wait until the 18th so that  
18 they have an opportunity to look at it and comment  
19 before I ask that to be submitted into the record.  
20 It is a newer version of exhibit 14.

21 HEARING OFFICER GEFTER: Thank you. So,  
22 Mr. Boyd, would you prefer to wait until the 18th?

23 MR. BOYD: Well, I'm not going to be  
24 here on the 18th, and in any case my objections to  
25 number 14 still stand. But I would like to



1 continue to question him about this, to clarify  
2 what the changes are between the document from  
3 January 29th and this one provided us today.

4 It looks to me like there's some  
5 handwriting in it that basically is the only  
6 changes that I can see. So I just want to  
7 clarify that, if that's okay.

8 HEARING OFFICER GEFTER: Ask your  
9 questions.

10 MR. BOYD: Okay.

11 MR. GALATI: Ms. Gefter, before we do  
12 that, I think I misspoke. Let me clarify. I  
13 characterized this as just a modification to  
14 number 14, exhibit 14. It is a little bit more  
15 than that. And I'm going to let Dwight Mudry  
16 explain that so there's no misunderstanding.

17 MR. BOYD: Certainly.

18 MR. MUDRY: Exhibit 14, which is a  
19 confidential letter that was submitted to the  
20 Energy Commission, was a proposal for the  
21 properties that would be used for the mitigation  
22 lands.

23 It has since been released from  
24 confidentiality because those lands have actually  
25 been acquired in some way -- either an option or

1 another way. So there was no need to be concerned  
2 about acquisition of the property. So that's  
3 exhibit 14.

4 And it does have an explanation of why  
5 those lands are important for the purpose that was  
6 proposed, that is mitigation of impacts. And also  
7 we went through a bit of the background and tried  
8 to explain to the staff and evaluate that proposal  
9 why those would be appropriate lands.

10 The staff, in I believe their final  
11 staff assessment, had a note hidden away somewhere  
12 in the document which I had noted -- wasn't  
13 purposely hidden, of course -- they would like, at  
14 some point before the hearings were completed, to  
15 have a management plan. I'm sure they'll recall  
16 that. Because they're interested in how those  
17 lands would be managed.

18 It's not just important to secure the  
19 land, but there is a long-term commitment by the  
20 Applicant and also by whoever might be actually  
21 managing those plans, to manage those properly.  
22 And in fact the staff would be interested in how  
23 they would be managed, what kind of frequency of  
24 things would be done on those properties, and that  
25 sort of thing.

1           So, together with that document that you  
2   have, 14, there was another document which we had  
3   discussed with staff, at least on the 18th, and  
4   have them evaluate between now and the 18th this  
5   habitat management plan, which they requested to  
6   be available. So the second document, which does  
7   not yet, I believe, have an exhibit number --

8           HEARING OFFICER GEFTER: It's 14A.

9           MR. MUDRY: Could be 14A. And let me  
10   just give you the title. It's called "Tesla Power  
11   Project, draft habitat management plan." It has a  
12   date on the bottom of September 2003. It has my  
13   scribbling in the upper corner, sent to Scott B.  
14   on 8/24.

15          MR. GALATI: And again with that, I  
16   realize they need an opportunity to review it.  
17   Dr. Mudry will be available on the 18th to answer  
18   any questions regarding it, but I did  
19   mischaracterize it as just an update to 14. It's  
20   more than that.

21          HEARING OFFICER GEFTER: Okay. Mr.  
22   Boyd, do you have any other questions?

23          MR. BOYD: Sure. To continue on this  
24   matter. You provided, earlier when I asked why  
25   you were claiming protection for this information,

1 and it's confidential, you stated that it was  
2 because of discussions on the acquisition  
3 basically of conservation habitat, is that  
4 correct?

5 MR. MUDRY: That's correct.

6 MR. BOYD: This copy, the biological  
7 resource mitigation implementation and monitoring  
8 plan, that you provided me --

9 HEARING OFFICER GEFTER: Again, exhibit  
10 2, response 40.

11 MR. BOYD: Okay. On page-- well, it's  
12 titled 4.6, I don't see a page number here,  
13 unfortunately. It talks about the acreage and the  
14 compensation, habitat conservation lands. At the  
15 time that this was produced, this wasn't  
16 confidential? And if it wasn't confidential, why  
17 did it become confidential when it got here,  
18 because it looks like the same tables to me.

19 MR. GALATI: I can clearly explain that.  
20 We had docketed exhibit 14 at an earlier time,  
21 confidentially. However, no one's been able to  
22 find that one. So I had to redocket exhibit 14.  
23 And during the same time that this was being done  
24 the actual location and the ownership and the  
25 identification of the parcels were the only thing

1 that was going to remain confidential.

2 So there is maybe a representation of a  
3 320 acre piece. There's a representation of the  
4 amount of acreage, but there shouldn't have been  
5 -- unless there was a problem with the dates in  
6 docketing -- that identified the actual specific  
7 parcel.

8 MR. BOYD: Okay. In fact, in there you  
9 listed the parcels and you say it's confidential  
10 in here.

11 HEARING OFFICER GEFTER: What document  
12 are you referring to?

13 MR. BOYD: This is the BRMIMP, 14A,  
14 table 4.3.

15 MR. GALATI: I apologize, it's not 14A.

16 HEARING OFFICER GEFTER: No, it's  
17 exhibit 6.

18 MR. BOYD: Exhibit 6, excuse me, table  
19 4.3.

20 HEARING OFFICER GEFTER: And Mr. Boyd,  
21 I'm going to cut off your line of questioning  
22 here, because all of this is moot. The documents  
23 are now available to review, and the Applicant has  
24 indicated that you can cross-examine on the  
25 documents on the 18th. So you'll have an

1 opportunity to review them. So let's move on to  
2 another line of questioning.

3 MR. BOYD: Okay. So the next question I  
4 have, it's my understanding there is not a  
5 biological opinion for this project yet, is that  
6 correct?

7 MR. MUDRY: No there is not.

8 MR. BOYD: Do you have a proposed or a  
9 conceptual time line for when a biological opinion  
10 would be issued for this project?

11 MR. MUDRY: No, I think it would be best  
12 to leave that to the Fish and Wildlife Service,  
13 and that's on the 18th.

14 MR. BOYD: On the 18th will there be a  
15 biological opinion prepared, do you know?

16 MR. MUDRY: There will be a person there  
17 who can tell us about the schedule you are asking  
18 about.

19 MR. BOYD: The schedule, there will be a  
20 person there to talk about the schedule. Could  
21 you tell me, as not just Intervenor but a member  
22 of the public, how I could have some meaningful  
23 and informed participation on that biological  
24 opinion if I can't get a copy of it? And I  
25 don't --

1           MR. MUDRY: I believe you can speak to  
2 the Public Advisor. Also, --

3           HEARING OFFICER GEFTER: Okay. Off the  
4 record.

5 (Off the record.)

6           HEARING OFFICER GEFTER: Back on the  
7 record.

8           MR. BOYD: I'm done. I'll just do it on  
9 public comment.

10          HEARING OFFICER GEFTER: Okay. Mr.  
11 Sarvey, do you have cross-examination?

12          MR. SARVEY: Mr. Mudry, you stated  
13 earlier that the public has had ample  
14 opportunities to review these documents. And  
15 considering your staff's own confusion and the  
16 Intervenor's just receiving it, do you still feel  
17 that that's true?

18          MR. MUDRY: Yes I do. The documents  
19 were docketed. I believe you and others are on  
20 the docket list.

21          MR. SARVEY: As I just said, we have  
22 just received these documents this morning.

23          HEARING OFFICER GEFTER: Okay, off the  
24 record.

25 (Off the record.)

1           HEARING OFFICER GEFTER: Back on the  
2 record.

3           MR. BOYD: Ms. Erichson, regarding  
4 exhibit 80. It's a letter from Sue Orloff to you.  
5 And in that letter did she state that the value of  
6 current proposed mitigation sites in this area  
7 will be greatly devalued as a result of this  
8 development? Was that her conclusion?

9           MS. ERICHSON: I'm not looking at the  
10 letter.

11          MR. SARVEY: Would you like a copy of  
12 it?

13          MS. ERICHSON: I have it here, I just  
14 don't have it in front of me. I received that  
15 letter, and actually I called her and spoke to her  
16 about her concerns. And basically the habitat  
17 mitigation and the project that she was reviewing  
18 in that letter was the original proposal.

19          Since that time mitigation has been  
20 developed and agreed upon that is much more  
21 substantial and fitting for the impacts for this  
22 project. And we have not, we've been keeping her  
23 in the loop. She knows the Fish and Wildlife  
24 Service and Fish and Game staff. They know her  
25 very well, too.



1           So we would be very appreciative of her  
2     appearing if she has any further concerns. But  
3     that letter was received at a time fairly early in  
4     this process. And I had talked to her about her  
5     concerns, so I wanted to make sure they were  
6     addressed.

7           MR. SARVEY: And when you stated that  
8     the value of the current, not the proposed but the  
9     current sites in this area, will be greatly  
10    devalued as a result of this development, did she  
11    change her opinion in anything that you've spoken  
12    to her since?

13          MS. HOUCK: Objection. That would call  
14    for speculation. Ms. Erichson can't testify as to  
15    what Ms. Orloff would or wouldn't say if she were  
16    here.

17          MR. SARVEY: I believe she said --

18          HEARING OFFICER GEFTER: The objection  
19    is sustained. You could ask Mr. Orloff directly,  
20    if you want to bring her as a witness.

21          MR. SARVEY: Okay. Exhibit 51, page  
22    4.2-32 of your testimony, fourth paragraph, you  
23    state in your testimony "available scientific  
24    literature indicates that levels above 60 DBA,  
25    especially above 80 DBA, are known to cause acute

1 disruption of behavior, physiological harm, immune  
2 state, and avoidance of the affected area."

3 Did you analyze how far that 60 DBA  
4 noise would emanate around this proposed power  
5 project?

6 MS. ERICHSON: Yes I did. And I  
7 discussed the noise levels with the qualified  
8 noise staff, who wrote the noise section of our  
9 AFC.

10 MR. SARVEY: And how far can --

11 HEARING OFFICER GEFTER: I'm sorry,  
12 correct that. They wrote the noise section of  
13 your FSA.

14 MS. ERICHSON: FSA, yes, I'm sorry,  
15 that's what I meant to say.

16 MR. SARVEY: And how far was that  
17 distance that that 60 DBA emanated from the plant?

18 MS. ERICHSON: I don't have that  
19 information right here in front of me, but I  
20 believe it's in my testimony. Do you have it? I  
21 think you just read it to me.

22 HEARING OFFICER GEFTER: If your  
23 testimony has that information --

24 MR. SARVEY: It's not in there.

25 MS. ERICHSON: It does contain that

1 information.

2 MR. SARVEY: Could you direct me to  
3 where that is please?

4 MS. ERICHSON: Second paragraph, under  
5 the impacts of noise and lighting, on page 4.2-32.

6 MR. SARVEY: It doesn't define how far  
7 the 65 DBA level emanates. Do you have an  
8 estimate of that?

9 MS. ERICHSON: Well, it will be below 42  
10 DBA within a mile of the project facility.  
11 Perhaps immediately around the project facility it  
12 may be around 80 DBA.

13 MR. SARVEY: So essentially you don't  
14 know how far that 60 DBA line emanates from the  
15 project, basically?

16 MS. ERICHSON: Well, it attenuates  
17 rather rapidly, and I would like to, if you want  
18 to, discuss this further with the noise expert. I  
19 have references that I can share with you, and  
20 show you, that describe how levels of noise  
21 change.

22 For instance, a 70 DBA sound may sound  
23 twice as high as a 60 DBA sound. It's not a  
24 linear change over distance noise decreases, it  
25 decreases rather appreciably. I don't want to

1 really get into the technical --

2 MS. HOUCK: And I would like to just  
3 state that Ms. Erichson is not a noise expert.  
4 She did consult with our noise experts in  
5 developing her testimony, and assessed the  
6 impacts. But I would just qualify that she is not  
7 a noise expert, and would refer Mr. Sarvey to our  
8 noise section for other levels of noise associated  
9 with the project.

10 HEARING OFFICER GEFTER: That's fine.  
11 Mr. Sarvey, do you want to move on?

12 MR. SARVEY: Essentially, I'm just  
13 trying to see if she determined any impacts since  
14 the mitigation that they're proposing surrounds  
15 the project, and its adjacent to a mitigation  
16 bank, I'd like to know what the 60 DBA effect is  
17 going to be on that parcel.

18 And I'm asking her does she know,  
19 because this is, we're proposing mitigation  
20 surrounding this parcel.

21 HEARING OFFICER GEFTER: All right. Ms.  
22 Erichson, only if you know. If you don't know,  
23 indicate that you don't have the answer.

24 MS. ERICHSON: I don't have the precise  
25 answer, but I have spoken with Wildlands and

1 discussed the levels of noise that are presently  
2 there, and discussed the species that are breeding  
3 or living in that area, and what, how they are  
4 coping with the current levels of noise and what  
5 potential levels of noise the project may add.

6 And that the additional noise from the  
7 project will add, particularly upon mitigation and  
8 minimization of noise during construction and  
9 operation, will be less than significant impacts.

10 MR. SARVEY: Will there be any impacts  
11 to sensitive plant species from the emissions from  
12 this project which can cause other plant species  
13 to crowd them out?

14 MS. ERICHSON: That's an interesting and  
15 important point. Staff did assess that. Staff is  
16 not aware that there are any special status or  
17 sensitive plants in the area that would be  
18 susceptible to the types of emissions that will be  
19 produced by this facilitate the levels that they  
20 will be produced.

21 Staff analysts are aware that there are  
22 serpentine grassland communities and serpentine  
23 soils that are sensitive to air pollution, such as  
24 nitrogens. Desert vegetative communities are also  
25 very sensitive to nitrogen and other types of air

1 pollution.

2 Those natural communities do not occur  
3 in the project site, and will not be impacted by  
4 the emissions, even if they were high enough to  
5 cause impacts to those communities.

6 MR. SARVEY: And did you examine the  
7 points of maximum impact from this project for  
8 sensitive plants?

9 MS. ERICHSON: Yes.

10 MR. SARVEY: And did you assess the  
11 impact of vernal pools of the aquatic species from  
12 the deposition of the criteria of pollutants from  
13 this project?

14 MS. ERICHSON: Yes I did.

15 MR. SARVEY: And what was your  
16 conclusion?

17 MS. ERICHSON: Well, my conclusion was  
18 that there would not be any significant impacts.  
19 There are no vernal pools within the project site,  
20 or within the areas that would be most heavily  
21 receiving some of the atmospheric emissions.

22 And there were no aquatic species that I  
23 know of, and that Fish and Game, Fish and Wildlife  
24 Service are aware of that would be in those areas  
25 that would be affected at the levels that would be

1 in the air and being deposited on the ground.

2 MR. SARVEY: Have you reviewed Dr.  
3 Smallwood's testimony?

4 MS. ERICHSON: Yes I have.

5 MR. SARVEY: And did you -- well, strike  
6 that. I'm all done. Thanks.

7 HEARING OFFICER GEFTER: Does that  
8 complete your cross-examination?

9 MR. BOYD: Yes.

10 HEARING OFFICER GEFTER: Okay. We have  
11 several people who wanted to make public comment  
12 on biology. We are going to append that until  
13 after the recess. And we're taking a recess now.  
14 (Off the record.)

15 HEARING OFFICER GEFTER: Back on the  
16 record. Before the recess Mr. Boyd indicated he  
17 had public comment on the topic of biology. Mr.  
18 Boyd, would you like to offer those comments?

19 MR. BOYD: Certainly. First, what I  
20 wanted to express was my, I'm a little  
21 disappointed with what I perceive as kind of an  
22 unfair, given an unfair hearing on biological  
23 resources. Because of the fact that we received  
24 the draft habitat management plan today.

25 And I kind of feel like we're being

1 deprived of our party rights, and our due process  
2 rights. Because what it seems like is this  
3 information is, this information is purposely  
4 being withheld from us to preclude us from our  
5 meaningful and informed participation.

6 We can't really -- what we've done  
7 actually, we have one expert, who is a paid  
8 expert, Dr. Smallwood, who isn't cheap. And it  
9 puts us at an extreme disadvantage not to have all  
10 the information that the other parties have, and  
11 to find that information has been withheld because  
12 of the claim of confidentiality, we find that even  
13 more disturbing.

14 And frankly I've never seen that in any  
15 other case. In many of the cases that CARE has  
16 been involved they come up with this type of  
17 mitigation bank or compensation by acquiring other  
18 land to compensate for, to mitigate the biological  
19 impacts. For example on the Metcalf Energy Center  
20 they did this as well, and that confidentiality  
21 issue didn't come up once there.

22 And also in the Altamont case they're  
23 proposing a similar mitigation and it didn't come  
24 up there. So we're really put at a disadvantage,  
25 and we feel like we're not getting a fair hearing.



1           Now the reason that we are participating  
2   at all isn't really because it benefits us. We  
3   don't perceive that it's even necessary. And Mr.  
4   Galati, you can cut me off at any time on this  
5   one, but one of the things that we're involved in  
6   is, we have a couple of members that brought  
7   litigation against a project that the Energy  
8   Commission approved in Blythe.

9           And in that case the plaintiff is a  
10   person named Alfredo Figuroa. Mr. Figuroa wasn't  
11   an Intervenor, he didn't show up to any of the  
12   evidentiary hearings. In fact, Mr. Figuroa didn't  
13   come until the very final meeting where the  
14   project was approved in Sacramento. And that's  
15   where he stated his objections.

16           And Mr. Figuroa has successfully  
17   prosecuted litigation in the court. In fact, we  
18   recently had a decision handed down by the Appeals  
19   Court, which upheld his right to pursue the  
20   litigation despite the CEC's pleadings to the  
21   opposite.

22           And the point that I'm trying to make is  
23   there is no necessity for any member of the public  
24   to be an Intervenor, to participate in any of  
25   these proceedings in order to litigate the issues

1 in court. We can wait until the very end, and  
2 after the PMPD comes out, show up at the last  
3 hearing, have our experts put in all their written  
4 testimony at the very end.

5 And that basically precludes the  
6 Commission from being able to consider it as  
7 evidence. But anything that's in your  
8 administrative records we can litigate on. So  
9 really, the point I'm trying to make is that we're  
10 here not because we have to be here, we're here  
11 because we want to resolve these issues short of  
12 going to court.

13 We would rather save all of you, the  
14 Applicant, money. We don't want to put a cloud  
15 over this project. We don't want to have to go to  
16 court. But when you set up the process in such a  
17 way where we don't feel like we're getting a fair  
18 hearing, where we can't present the issues that  
19 we're concerned about and have a fair discussion  
20 on it, that leaves us no choice but to use the  
21 litigation angle.

22 And we'd rather not do that. We're not  
23 rich, we don't have a lot of money to do this  
24 stuff. It costs us a lot of money just to get Dr.  
25 Smallwood here. So really that's the nature of

1 our objections. That's why it's so important that  
2 we be allowed to ask our questions, that we be  
3 allowed to identify those issues that we have a  
4 difference on, and try and resolve it here, rather  
5 than in the courts.

6 HEARING OFFICER GEFTER: Okay, thank you  
7 Mr. Boyd.

8 MR. BOYD: That's my public comment.  
9 That's all I have. Thank you.

10 HEARING OFFICER GEFTER: And with  
11 respect to exhibit 14A, which is what you're  
12 referring to, that document was dated September of  
13 2003, so nobody has seen it until now.

14 MR. BOYD: I'm talking about 14, not  
15 14A. 14A was the second attachment for the 30th.

16 HEARING OFFICER GEFTER: And indeed, you  
17 were given copies of both 14 and 14A today, and  
18 you will have an opportunity to review it, as will  
19 Dr. Smallwood, and we will reconvene on that topic  
20 of biology --

21 MR. BOYD: We can't afford Dr. Smallwood  
22 anymore.

23 HEARING OFFICER GEFTER: Okay. Mr.  
24 Galati, do you have any comments in response?

25 MR. GALATI: Actually no, I don't have

1 any comments. Thank you.

2 HEARING OFFICER GEFTER: Okay. Off the  
3 record.

4 (Off the record.)

5 HEARING OFFICER GEFTER: Back on the  
6 record. We're going to move on to the topic of  
7 water resources. Oh -- Mrs. Sarvey, did you have  
8 a comment on biology? Please come forward.

9 MS. SARVEY: Susan Sarvey, Clean Air for  
10 Citizens and Legal Equality. I think it's really  
11 important that the people who live in this  
12 community and in this area that this plant is  
13 being sited be approached and discussed about  
14 biological issues because we have a lot of  
15 information available to us that you don't have  
16 because you don't live here.

17 And I'm going to read the public comment  
18 of Gordon Griffith for him. He lives immediately  
19 next to the Tesla site at 20044 Midway road,  
20 adjacent.

21 HEARING OFFICER GEFTER: So is he within  
22 a mile?

23 MS. SARVEY: Yes.

24 HEARING OFFICER GEFTER: Is Applicant  
25 aware of residents that are within a mile of the

1 site?

2 MR. GALATI: That's the Griffith  
3 residence we were discussing yesterday. That's  
4 the closest residence. It's actually unoccupied.  
5 He does live on the property a little ways away  
6 from there.

7 HEARING OFFICER GEFTER: So it's within  
8 a mile.

9 MS. SARVEY: And his property is  
10 adjacent. The topic is vernal pools. "I believe  
11 we have a vernal pool within one mile of the plant  
12 site. The pool, when formed, is big enough to  
13 support duck life, swimming ducks." If you would  
14 like more information about his vernal pool, you  
15 can contact him. His information is on here.

16 I think this is a classic example of why  
17 it's critical that you don't just talk to a bunch  
18 of experts and people with Fish and Game, but you  
19 talk to the people that live here.

20 Because we know what wildlife we have,  
21 we know we have vernal ponds everywhere here,  
22 they're quite common. My kids play in them a lot.  
23 So you may want to revisit this issue and talk to  
24 the people who live here. Thank you.

25 HEARING OFFICER GEFTER: Thank you for

1 bringing that up. And we are planning to open, to  
2 keep the topic of biology open for testimony on  
3 the 18th. And between now and then perhaps staff  
4 and the Applicant could review the comments of Mr.  
5 Griffith and look into his allegation that there  
6 is a vernal pool on his property.

7 MS. HOUCK: Staff can do that.

8 HEARING OFFICER GEFTER: Thank you very  
9 much. The next topic is -- we're going to leave  
10 the topic of biology open, and move on now to the  
11 topic of soil and water resources.

12 And before we take testimony on this  
13 topic the parties have requested a public workshop  
14 to discuss the issues and perhaps we can narrow  
15 our issues down and try to reach closure on some  
16 of the disputed matters regarding this topic. At  
17 this point we will recess to a workshop.

18 (Off the record.)

19 HEARING OFFICER GEFTER: Back on the  
20 record. I want to explain to members of the  
21 public what process we just went through here.  
22 The parties had asked to have a discussion of the  
23 issues, so that we could narrow the areas from  
24 litigation.

25 And so we recessed off the record into

1     what I called the workshop, it was more like a  
2     conference, a discussion. It was a public  
3     discussion, members of the public were present  
4     during the discussion. And the parties told us  
5     what some of the issues are that they re concerned  
6     about with respect to water supply to the project.

7             And during that discussion Commissioner  
8     Geesman gave the parties guidance as to what  
9     issues he thinks are important. I don't know if  
10    you want to reiterate that now?

11            COMMISSIONER GEESMAN: No.

12            HEARING OFFICER GEFTER: Okay. The  
13    parties have been told what we're interested in  
14    hearing. And at this point the parties would like  
15    to put on testimony which has already been filed  
16    as direct testimony. They want to put on their  
17    witnesses for our benefit. And so I'm going to  
18    ask the Applicant to go forward with your  
19    witnesses at this time.

20            MR. GALATI: First of all, I'd like to  
21    make a clarification that the districts are here.  
22    And I'd like them to identify themselves in just a  
23    moment. And to also identify that there was no  
24    prefile testimony. We didn't sponsor them as  
25    witnesses.

1           The Committee invited districts to come.  
2   The districts had made a presentation about the  
3   water supply that we were going to use as our  
4   foundational facts in describing the water supply.  
5   Since the district has come, we'd like them to be  
6   able to do that now.

7           So maybe it would be best if I just turn  
8   over the microphone to members of the district and  
9   let them introduce themselves and explain to you  
10   what the water supply is, and how they're going to  
11   proceed.

12           HEARING OFFICER GEFTER:   Okay.   And  
13   could we have the business cards.   And if not,  
14   could you please spell your name and indicate the  
15   name of your district.

16           MR. MILOBAR:   Okay.   And we'll do this  
17   individually?

18           HEARING OFFICER GEFTER:   Yes.

19           MS. HOUCK:   I apologize.   Is it okay  
20   to --

21           HEARING OFFICER GEFTER:   Off the record.  
22   (Off the record.)

23           HEARING OFFICER GEFTER:   Back on the  
24   record.   And before the district's begin, I  
25   understand that you would just be making



1 statements to assist the Committee in  
2 understanding the arrangement that you have with  
3 zone 7, that it is not testimony. Is that  
4 correct, Mr. Galati?

5 MR. GALATI: Well, the agency comment,  
6 and they can have any interplay. I just wanted to  
7 say that it wasn't our testimony that we were  
8 sponsoring. My experience has been that the  
9 Commission extended the same testimony privileges  
10 to agencies, and I would expect that response.

11 HEARING OFFICER GEFTER: Okay. Well,  
12 what I want to do then, is I'm going to ask that,  
13 individually, the representatives be sworn, so  
14 that we can rely on their testimony, in case there  
15 is any question. All right.

16 MR. GALATI: Thank you. I appreciate  
17 that.

18 HEARING OFFICER GEFTER: So why don't  
19 you all introduce yourselves, and then be sworn.  
20 So we know who's being sworn, and then we can  
21 begin.

22 MR. MILOBAR: My name is Martin Milobar.  
23 I'm Engineer and Manager of Buena Vista Water  
24 Storage District in Kern County. I've been with  
25 the district since 1984. I'm a Registered

1 Professional Engineer in the disciplines of  
2 agricultural engineering and civil engineering.

3 HEARING OFFICER GEFTER: Could you  
4 please spell your name for the reporter?

5 MR. MILOBAR: It's, Martin is the first  
6 name, the last name is M-i-l-o-b-a-r.

7 HEARING OFFICER GEFTER: Thank you. And  
8 do you want to also spell the name of your  
9 district for the reporter?

10 MR. MILOBAR: It's Buena Vista, B-u-e-n-  
11 a V-i-s-t-a, two words, Water Storage District.

12 HEARING OFFICER GEFTER: Okay. And then  
13 next?

14 MR. BARTEL: My name is Dan Bartel. I'm  
15 the Assistant Manager for the Buena Vista Water  
16 Storage District. My name is spelled D-a-n B-a-r-  
17 t-e-l. I'm also a civil engineer. I've been with  
18 the district since 1993.

19 HEARING OFFICER GEFTER: Thank you.

20 MR. CROSSLEY: Hal Crossley, General  
21 Manager, Rosedale-Rio Bravo Water Storage  
22 District. I've been in water for about 23 years,  
23 nine years with Rosedale. And the last name is C-  
24 r-o-s-s-l-e-y, the first name is Hal H-a-l.

25 HEARING OFFICER GEFTER: Okay. And it's

1     Rosedale --

2                 MR. CROSSLEY:   Rosedale R-o-s-e-d-a-l-e  
3     hyphen Rio Brave, R-i-o B-r-a-v-o.

4                 HEARING OFFICER GEFTER:   Thank you.

5     Water Storage --

6                 MR. CROSSLEY:   Water Storage District,  
7     correct.

8                 HEARING OFFICER GEFTER:   Okay.   Anyone  
9     else?

10                MR. MCMURTREY:   I'm Gene McMurtrey, M-c-  
11     M-u-r-t-r-e-y.   McMurtrey, Hartsock and Worth,  
12     second name is H-a-r-t-s-o-c-k, Worth W-o-r-t-h.  
13     I'm an attorney practicing since 1969.   I'm  
14     general counsel for Buena Vista Water Storage  
15     District, and special counsel for Rosedale-Rio  
16     Bravo Water Storage District.

17                HEARING OFFICER GEFTER:   Okay.   So I  
18     have four individuals. I'm going to ask Mr.  
19     Milobar, Mr. Dan Bartel, Mr. Crossley -- actually  
20     I'll ask the three of you to stand and be sworn.  
21     Mr. McMurtrey, you're their counsel, I understand,  
22     so you don't need to be sworn.

23                MR. MCMURTREY:   Yes.   They've asked me  
24     to review with you the environmental process that  
25     we went through for our project.   I don't know

1     whether you want me to do that as testimony. I'd  
2     be happy to be sworn if you'd like to have it in  
3     that form?

4             HEARING OFFICER GEFTER: I think we'll  
5     just let you represent them as an attorney. Mr.  
6     Milobar, Mr. Bartel and Mr. Crossley, please be  
7     sworn.

8     Whereupon,

9             MARTIN MILOBAR, DAN BARTEL AND HAL CROSSLEY  
10     were called as witnesses herein, and after first  
11     having been duly sworn, were examined and  
12     testified as follows:

13            HEARING OFFICER GEFTER: Okay, we will  
14     begin. Who wants to begin?

15            MR. CROSSLEY: I wanted to ask you a  
16     question. We put together a powerpoint  
17     presentation. Obviously we're set up to do it on  
18     the wall, but if you prefer we can just give you  
19     copies so you can follow along with us. So  
20     whatever you're preference is.

21            HEARING OFFICER GEFTER: On the wall,  
22     because the people in the audience -- unless you  
23     have enough copies for the people in the audience?

24            MR. CROSSLEY: Probably just for those  
25     on the table.

1           HEARING OFFICER GEFTER:   Okay, so why  
2   don't we put it on the wall so our local residents  
3   can also watch.

4           Okay, please begin.

5           MR. MILOBAR:   This program, this is a  
6   typical recharge pond that you might see in Kern  
7   County.  There are many banking programs,  
8   recharging banking programs in the county that  
9   have been developed over the last ten to fifteen  
10   years.  Some of them date back as far as 25 or 30  
11   years.

12           This particular program, Buena Vista  
13   Rosedale-Rio Bravo water banking and recovery  
14   program, is the one that you're getting specifics  
15   on today.  The introductions were already made,  
16   and they are listed right there.

17           This shows you our locale with respect  
18   to the state, and we're up in this area right now.  
19   This is Kern County down below.  The California  
20   Aqueduct does come out of the bay, and parallels  
21   I-5, going right through and past Kern County on  
22   its way to Metropolitan Water District, southern  
23   California.

24           It's probably best to describe Buena  
25   Vista first, and then I'll give it to Hal

1 Crossley. Let's go back one. This is a typical  
2 extraction well in Buena Vista Water Storage  
3 District.

4 We participate in a number of banking  
5 programs. This particular one is in our district  
6 proper. You can see the cropland in the  
7 background. Our primary purpose, of course, being  
8 to supply surface water to agricultural users in  
9 our district.

10 Our district is approximately 50,000  
11 acres in size. It's all agricultural water use.  
12 Our supplies are Kern River water, which is  
13 regulated in an upstream reservoir called Lake  
14 Isabella.

15 We have a perpetual contract for use of  
16 conservation storage space in that reservoir,  
17 which amounts to about 170,000 acre-feet of space  
18 that we can use at different times. We also have  
19 gotten other supplies. Kern water is the Bureau  
20 of Water, a state water project.

21 We have a contract through the Kern  
22 County Water Agency for state water project water,  
23 and like it says here, our agricultural uses are  
24 rental or pumping and surface water deliveries.  
25 This particular well is one of the wells that was

1 drilled a number of years ago by the district.

2 We're presently in the process of  
3 drilling additional wells, and there are funds  
4 being received from the state, bond issue funds  
5 that will pay for approximately 50 percent of the  
6 cost of the wells that we're drilling this year.

7 There has been quite an influx of money  
8 by the state bond issues for infrastructure  
9 improvements that have occurred in Kern County.  
10 And if I had to guess at the total amount of money  
11 that's been allocated to Kern County only for  
12 these kinds of improvements, it's probably in the  
13 order of 70 or 80 million dollars just in the last  
14 two or three years.

15 And likewise up and down the state. So  
16 there's a big push right now to allow districts  
17 and to actually provide money to encourage  
18 districts to improve their ability to regulate  
19 water.

20 And one of the largest sources in  
21 California that needs more regulation for  
22 beneficial use is flood waters. And a lot of the,  
23 practically all the banking programs in Kern  
24 County use re-regulated flood water into the  
25 groundwater basin for later extraction and use for

1 benefit to local entities as well as third party  
2 benefits throughout the state.

3 I'll let Hal Crossley describe his  
4 district in brief, and then Dan Bartel will walk  
5 you through the details of the program that we've  
6 developed together.

7 MR. CROSSLEY: The Rosedale district is  
8 adjacent to the Buena Vista district. It was the  
9 perfect marriage of the two districts to partner  
10 in the program we're going to present today. But  
11 the Rosedale district is almost centrally located  
12 on the Kern River fan, actually it's a little over  
13 44,000 acres.

14 The east side of the district is  
15 adjacent to the city of Bakersfield, so we're  
16 becoming fairly heavily residential in that area.  
17 But the district is still primarily agricultural.  
18 The district owns roughly ten percent of the land  
19 in the district, which it uses for recharge ponds  
20 and conveyance facilities and in addition to that  
21 of course there are some undeveloped and fallow  
22 lands which constitute the ten percent.

23 Rosedale's water supply is a contract  
24 with the city of Bakersfield for water off the  
25 Kern River. We do have annual contracts with the



1 Bureau for 215 water when it becomes available off  
2 the friant system. And we do have a contract with  
3 the Kern county Water agency for stake water.

4 I might just point out that there's 15  
5 member units in the Kern County Water Agency, and  
6 the Kern County Water Agency has contracted for 25  
7 percent of the water on the state project, so that  
8 makes us, as member units of the agency, very  
9 knowledgeable with regard to state water and  
10 what's going on with water up and down the state.

11 Our district is a little bit different  
12 than a lot of other districts in that we don't  
13 have an elaborate distribution system. All of our  
14 landowners have their own wells, and so as a  
15 result most of the water we bring into the  
16 district is for direct recharge.

17 I wanted to explain something. Down in  
18 Kern County we, like I said, -- and that's not to  
19 pat us on the back, but by necessity we're very  
20 knowledgeable about the water in the state of  
21 California.

22 We have basically three surface supplies  
23 in Kern County -- the Kern River, the friant  
24 system, the CVP, an state water project. And  
25 Rosedale, for example, where we're situated on the

1 Kern River fan, we have -- and this is without  
2 bragging -- probably some of the best recharge  
3 ground in the state of California.

4           We have unbelievable soils that have  
5 been deposited from the eastern Sierras -- or west  
6 side of the Sierras actually -- that have come  
7 down the Kern River over years, and the natural  
8 slough that runs through the district, called the  
9 Goose Lake slough, has soils that have been  
10 deposited over eons of time, and very coarse  
11 granite soils that take water like a sponge.

12           When we started introducing water in  
13 there it's not unusual for our ponds to take six  
14 or eight feet a day, which is, you know, a pretty  
15 good rate. And we have well over a million acre-  
16 feet of storage under us.

17           And so, in 1995, my district, we  
18 convened a series of goals and objectives  
19 meetings, trying to look forward 25 to 50 years  
20 and anticipate what was happening. We saw an  
21 increase in urbanization in the eastern end of the  
22 district, we saw increased competition of water  
23 supplies, diminishing reliability, increasing  
24 costs.

25           And we -- all my five board members are

1 all farmers, they're some of the major landowners  
2 in the district. And so what were we going to do  
3 to make sure that our district stayed in balance,  
4 number one, and number two what we were going to  
5 do to try and keep farming viable in the district.

6 And the only thing we could do was look  
7 at the resources and assets that we had and try to  
8 utilize those to number one increase our water  
9 supply reliability, and number two generate some  
10 cash flow whereby we could build facilities and  
11 stabilize the cost to the landowners.

12 And so that's what we started to do.  
13 And that's been eight years we've been working on  
14 that, which brings us to where we are today. And  
15 so this wasn't some haphazard thing. And we, like  
16 I said, we formed a partnership with Buena Vista.

17 Buena Vista is in the enviable position  
18 of having a huge lower river water right, and so  
19 between our recharge and storage and their high  
20 flow water, it made a perfect partnership.

21 And so we're talking about joint  
22 groundwater banking program between two adjacent  
23 districts, optimized utilization of wet year  
24 supplies through groundwater recharge, and the  
25 whole name of the game.

1           And, like Marty alluded to, the reason  
2 money is coming through the state of California,  
3 Prop. 13 and stuff, the state of California is  
4 encouraging districts and locales to try to become  
5 independent of relying on the state project or  
6 other projects, and try to cure their own water  
7 needs.

8           And so that's what our program does. We  
9 create dry year supplies for third-party users,  
10 inside and outside of Kern County. Once again,  
11 optimizing the resource available to us. The  
12 proceeds that we would generate from the sale of  
13 this water creates new infrastructure, reduces  
14 overdraft, and stabilizes the water cost.

15           Our district has already expended about  
16 two million dollars in brand new recharge bonds  
17 that we dedicated in January. Like I said, a lot  
18 of the area in our district is becoming  
19 residential, so the cost of this land is  
20 escalating very rapidly.

21           And so we're trying to generate the  
22 revenue to grab as much of this, and preserve this  
23 recharge ground before it all gets away from us.  
24 The program that we've instituted between the two  
25 districts, perfectly fits in to our district's

1 goals and the statutory authority that we have as  
2 water storage districts.

3 I think we may need to move to the next  
4 page? Oh, Dan, you're going to do this part?

5 MR. BARTEL: Thanks, Hal. I just want  
6 to go through some of the details of the program.  
7 Things are never as simple as they seem. When you  
8 put water deals together they're very complicated,  
9 so bear with me. I'll try to make it as simple as  
10 possible.

11 But as Hal alluded to, this is a  
12 partnership between projects, and Hal was very  
13 instrumental in that. I kind of call him Tommy  
14 Lasorda. I know we're in northern California, but  
15 he's kind of the rah-rah guy, and he gets people  
16 together, and puts good programs together to  
17 maximize what we do.

18 As Hal says, he's pretty central to the  
19 Kern River fan right here. Here's the Kern River,  
20 coming right through the city of Bakersfield and  
21 on down. This is the whole Kern River fan area.

22 Here's Buena Vista Water Storage  
23 district, and the California Aqueduct coming right  
24 here on our western boundary, and heading down  
25 south over the Tehachapis to southern California.

1           So what this project does basically is  
2   take water in a flood year, you know, 140-150  
3   percent above normal, and instead of diverting  
4   that into the California intertie, which is a  
5   flood control structure here that I'll show you  
6   later in a photo, for non-beneficial purposes,  
7   they'll now divert that into Rosedale-Rio Bravo's  
8   newly constructed recharge ponds, and ponds that  
9   they will construct for groundwater recharge.

10           And then in the dry years, or on an  
11   every year basis with a customer like Tesla,  
12   they'll recover that water and deliver it either  
13   back into the aqueduct directly or via exchange of  
14   releasing some of their state water entitlement to  
15   their customer, depending on where he's located.

16           Obviously, if it's northern California  
17   it would be an exchange mechanism. So that's kind  
18   of the program in a nutshell. There's a lot of  
19   complicated pieces of it that I won't bore you  
20   with, but there is also some recovery out of Buena  
21   Vista as part of this program.

22           75 percent of the recovery comes out of  
23   Rosedale to the customers, and 25 percent of the  
24   recovery comes out of Buena Vista. Because we  
25   have such a strong Kern River supply our

1 groundwater is very abundant, so we want to take  
2 some of that surplus groundwater and put it to  
3 beneficial purposes over and above our landowners  
4 needs.

5 And so, it's a very firm supply, it's  
6 been there for a long time, and that gets back to  
7 the 80,000 acre feet that Mr. Osias alluded to,  
8 that's been banked over years past and is  
9 available for those customers.

10 MR. CROSSLEY: I just wanted to  
11 highlight that when Dan mentions recovery, the  
12 state water project would have to get down to 15  
13 percent or less allocation before we would have to  
14 do any in-district recovery with recovery wells.

15 Other than that we have an amount coming  
16 down the California Aqueduct from Banks pumping  
17 plant that would take care of the water from the  
18 pumping plant.

19 MR. BARTEL: Okay, next slide. This is  
20 kind of a typical rendition of what would happen  
21 in a wet year. And I go back to 1998 because  
22 that's the last wet year we had. We're looking  
23 for some more, and as they say we're due for one.  
24 This is Lake Isabella, and in 1998 it produced 1.7  
25 million acre-feet of Kern river runoff.

1           And that produced a river right to Buena  
2   Vista of 480,000 acre feet. Our in-district  
3   demands are 150,000 to 180,000 acre-feet of water  
4   for our irrigation needs. Now the Kern River is  
5   feast or famine, we're either really dry or really  
6   wet.

7           So Buena Vista has to get creative on  
8   what we're going to do with those wet year  
9   supplies, rather than just flood farm ground in  
10   Tulare Lake or in Buena Vista Lake, we'd rather  
11   put that to beneficial uses. So over the course  
12   of the last ten or fifteen years, as Mr. Milobar  
13   alluded to, we've been creating groundwater  
14   recharge programs, to put that to beneficial use.

15           And so what happens, as in 1998, if it  
16   were to occur again -- and this project is in  
17   place now -- we would take up to 70, 80,000 acre-  
18   feet, and put that into new Rosedale recharge  
19   ponds. And so that would take 50,000 acre-feet  
20   out of the Kern River intertie that went to not  
21   beneficial purposes.

22           And that would also take 20,000 acre-  
23   feet out of Tulare Lake that wouldn't flood farm  
24   ground. And I know we talked earlier about farm  
25   ground and that was kind of an issue here, not to



1 take farm ground out of production.

2 MR. CROSSLEY: I just wanted to  
3 highlight also, I mean I know that Dan's going  
4 pretty fast, but when you think about it, the Kern  
5 River water, some of the highest quality water in  
6 the United States, is now going to be captured,  
7 kept in Bakersfield for use by the overlying land  
8 owners, the businesses, the farms, the residents  
9 of Bakersfield, and a lesser quality state water,  
10 higher TDS, more salt content and everything, is  
11 going to be used to send to the pumping plant.

12 So this is a water use that is  
13 continually being promoted, keeping the higher  
14 quality water for the highest beneficial use.

15 MR. BARTEL: Right. And when we talk  
16 about policies that's a policy we have in Kern  
17 County, is maximizing the amount of the best  
18 quality water for our recharge projects to protect  
19 the basin, and using the lesser quality water --  
20 like the state water project -- when we say  
21 lesser, it's not bad quality water, we don't want  
22 them to get that idea. But it's a lesser quality.

23 So we prioritize the Kern River water in  
24 those recharge ponds over the state water, and  
25 that's, that gets very technical and involved.

1 Next slide.

2 As we developed this project we went  
3 through a whole host of hydrologic studies. One  
4 of our first customers, Tesla Power Plant, were  
5 very interested in a very firm supply, and how are  
6 you going to convince us that it's very firm.

7 So we did extensive analysis about our  
8 project. We evaluated four different 35-year  
9 periods of hydrologic periods to confirm the  
10 available supply. And we modeled not only filling  
11 Tesla's demand but we had other customers in  
12 mind -- not specific ones, but we had different  
13 kinds of customers, and we figured out we could do  
14 a project twice as large as Tesla's, almost twice  
15 as much, so that's another five to six thousand  
16 acre-feet available for other customers.

17 And it's been talked about before that  
18 Tesla has, as part of our negotiations, 81,000  
19 acre-feet and a 13 year supply to get them going.  
20 Next slide.

21 This is one of the typical account  
22 models that we did on one of the worst hydrology  
23 periods. And the thing I want to show you here is  
24 the red bars denote the recovery out of the  
25 program. So you see it comes out on an every year

1 basis, some years more, some years less.

2 Kind of the base supply here would be  
3 like a power plant, in the 6,000 acre-foot range,  
4 and then in some of the other years about twice  
5 that much. The blue bars represent inputs into  
6 the banking program. So the red are recovery, the  
7 blue are inputs.

8 And you can see the feast and famine  
9 Kern River scenario. It's basically between five  
10 and seven years out of 35 we get these big years  
11 where we recharge into our facilities. And  
12 that's, I mean, that's important. And this line  
13 here just represents what the account balance does  
14 over time.

15 So we frontload the project with a block  
16 of water for Tesla, and then it fluctuates over  
17 time. But remember that five to seven years out  
18 of 35, that's important later. On the 18th we'll  
19 talk about the shrew that's important.

20 Current program status is we are  
21 operational. Mr. McMurtrey will talk later about  
22 our CEQA process, but we've finished that. And  
23 Hal is speedily building facilities. This is one  
24 of the intake facilities to one of his recharge  
25 ponds.

1           And we had a dedication. Here's a  
2 plaque here, it was kind of a real memorable event  
3 for a retired director of theirs that they named  
4 the project after. And he's really a visionary in  
5 conjunctive use programs.

6           He was way ahead of the state of  
7 California when he was developing Rosedale's  
8 policy of conjunctive use, and now it's a big  
9 thing in the state of California to develop these  
10 banking conjunctive use programs. And he was  
11 thinking about that 40 years ago. Next slide.

12           This is an aerial photo of one of the  
13 new ponds in Rosedale that's been constructed over  
14 the last year, six months. This is a 160 acre  
15 project, and they did do some recharge here for a  
16 little while this year, even though it wasn't  
17 real wet.

18           But Rosedale has constructed new intake  
19 structures. To date 160 acres of new recharge  
20 ponds. That was farm ground at one time, and it  
21 was probably one of the most sandiest pieces of  
22 property around.

23           As farmers know, when their ground is  
24 really sandy they can't get the water across and  
25 it's really difficult to irrigate, and so what

1 better place to construct a recharge pond than in  
2 a piece of ground that's very difficult to  
3 irrigate because it infiltrates so fast.

4 They've had to do numerous county road  
5 crossing improvements to increase the capacity  
6 through their system, and those are very costly.  
7 And channel capacity improvements of the historic  
8 Goose Lake slough, jerry slough, that they've done  
9 through their district. Next slide.

10 This is another photo of those ponds.  
11 And as Hal said they've spent somewhere between  
12 1.5 and two million dollars to date, and there's  
13 more improvements planned for 2004 and 2005. More  
14 recharge ponds, extraction facilities, and we've  
15 also been recovering now on the program.

16 Over the last three years we've  
17 delivered about 65,000 acre-feet to its -- that's  
18 EWA there, environmental water account -- and if  
19 any of you are familiar with the state water  
20 project, that's an environmental account that  
21 helps to deal with impacts in the delta.

22 And we've been an active transfer party  
23 to those folks. And so we've been providing water  
24 for environmental purposes there. And we've also  
25 been out soliciting other potential buyers, and

1 the bottom line is we are ready to execute long-  
2 term agreements.

3 And we've been ready to execute long-  
4 term agreements with Tesla, but there's been some  
5 problems along the way. Not relative to us, but  
6 to the process. Next slide.

7 MR. MCMURTREY: I was asked to just let  
8 you know that we have in fact completed our  
9 environmental review process for the project. We  
10 began this process approximately a year or so  
11 ago -- actually more than that, maybe a year and a  
12 half ago.

13 I should point out that Rosedale  
14 initiated the process with a programmatic EIR,  
15 they call it their mastery EIR, for facilities to  
16 be constructed in Rosedale for banking projects.  
17 It was somewhat a generic document in that it  
18 described, in a general way, recharge facilities.

19 It described the use of the 300,000  
20 acre-feet of storage capacity in the basin  
21 underlying Rosedale. And it described recovery  
22 facilities that might generate as much as 45,000  
23 acre-feet of recovery capacity.

24 They then followed that with a negative  
25 declaration, they tiered off of that with negative

1 declaration for specific recharge facilities for  
2 specific projects, including this project. So it  
3 had approximately three wells and some recharge  
4 facilities connected with it.

5 In addition to that, Buena Vista was the  
6 lead agency for another EIR that actually  
7 described the water put and take operation. Which  
8 -- I have a copy here. And, in any event --

9 HEARING OFFICER GEFTER: Off the record.  
10 (Off the record.)

11 HEARING OFFICER GEFTER: Back on the  
12 record.

13 MR. MCMURTREY: Yes, this is it. They  
14 started that process in early 2002. They went  
15 through several public hearings. They deposited  
16 the document with the state clearinghouse. And I  
17 think we're on to the next slide.

18 I understand this has been marked as  
19 exhibit --

20 MR. GALATI: Yes. I just want to point  
21 out that the document that Mr. McMurtrey is  
22 referring to has been marked as exhibit 15 by the  
23 Applicant.

24 MR. MCMURTREY: In any event, comments  
25 were received from various public agencies and

1 individuals. We responded to those comments. We  
2 did certify the final EIR in October of 2002. The  
3 slide will indicate that we did receive one  
4 comment relative to the shrew.

5 We did respond to that comment. I won't  
6 go into any detail on that, I understand that will  
7 come up on the 18th -- unless you want to hear it  
8 now.

9 In addition to that, after having  
10 certified the final EIR for the project, and  
11 entered into it, we also entered into what we  
12 called memoranda of understanding with various  
13 entities that adjoin the project, or adjoin these  
14 districts. Such as the Kern water bank, semi-  
15 tropic water storage district, the Kern County  
16 Water Agency, and others.

17 The purpose of the memoranda of  
18 understanding is to establish a forum for dispute  
19 resolution for those entities that might be  
20 affected by operation of the project. also to  
21 establish monitoring programs for the operation of  
22 the project, and mitigation measures in the event  
23 that impacts are perceived from the project.

24 And all of this was accomplished by  
25 negotiated agreements. We have a monitoring



1 committee composed of representatives of all those  
2 entities, which meet regularly and review those  
3 operations.

4 MR. MILOBAR: It's probably important to  
5 explain that the process Gene just described  
6 actually started being formulated probably eight,  
7 nine years ago, when actually the state project  
8 bought the Kern water bank land, some 20,000 acres  
9 of lands, for the purpose of storing regulated  
10 water in the groundwater basin.

11 And there needed to be a forum to keep  
12 track on how all this operation was occurring, and  
13 if there were any adjacent impacts. So that's  
14 when the MOU process was actually formulated, and  
15 then it was agreed by all the districts  
16 surrounding that project and other projects that  
17 were already existing that everyone, when they  
18 formulated a program, they would do the same  
19 thing, they would agree to formulate a similar  
20 MOU, so that everybody in the county that's  
21 working under these programs is under the same set  
22 of rules.

23 And data collection is very detailed.  
24 We track what happens during recharge years, what  
25 happens during extraction years, and everybody is

1     working together on the degree of extraction that  
2     can occur in any one year.

3                 So it's a very coordinated program, so  
4     that you don't have somewhat of a haphazard  
5     occurrence of a bunch of projects. They're all  
6     working together.

7                 MR. CROSSLEY: I wanted to highlight one  
8     more thing for the Commission and for the  
9     interested parties. And I don't know if we're  
10    going to do the rest of this powerpoint today or  
11    not.

12                But one think I wanted to highlight for  
13    you is I described for you capturing of high  
14    quality water and keeping it in the basin, the  
15    aquifer underneath Bakersfield, for highest  
16    beneficial use. I wanted to also point out what  
17    happens to this water if it were not captured.

18                This water, in the high flow years, when  
19    it comes down the Kern River, in excess of 140  
20    percent, 200 percent of Kern River, this water  
21    either goes out the intertie, you know, it goes  
22    back into the California Aqueduct, or it goes  
23    north in the Kern River channel, heading up  
24    towards Tulare Lake.

25                And there are many other streams north

1 of us, the White River, and a number of streams  
2 north of us that feed into the Tulare Lake area.  
3 Well, what the landowners in those areas do,  
4 because you're flooding crop ground and you're  
5 cutting off roads and everything else up around  
6 Corcoran and in that general area, and so their  
7 spending a lot of money to pump the water out of  
8 those rivers into the friant Kern canal, which  
9 comes down the friant Kern, and dumps into the  
10 Kern River.

11 And there were years, I can remember in  
12 the 80's, when Boswell spent the money to put  
13 pumps along the chuck structures in the California  
14 aqueduct to reverse flow the water to try to get  
15 rid of this water, because of all the damage and  
16 farm ground that are flooded and everything.

17 So, on the one hand you've got this high  
18 quality water being put to good use instead of  
19 being lost, and number two, you're helping to  
20 mitigate a damage situation on the other end. So  
21 it was a program that was extremely well received  
22 in Kern County.

23 MR. BARTEL: Just for your benefit, this  
24 is the Buena Vista shrew -- do you want to defer  
25 testimony on that until the 18th?

1           HEARING OFFICER GEFTER:  Yes, we're  
2   going to take testimony on the shrew on the 18th.  
3   The U.S. Fish and Wildlife witness will be here  
4   then.

5           MR. BARTEL:  Okay.  some of the bullets  
6   on these pictures are relevant to the shrew, but  
7   I'll just kind of point out what the pictures are  
8   and they're kind of relevant to our program as  
9   well.  So next slide.

10          This is the Kern intertie we've been  
11   talking about.  This is the summit basin that, as  
12   the waters come flooding down the Kern River  
13   channel they go into an intake channel here.  And  
14   this is a black and white photo so it's kind of  
15   hard to see, but this is the California Aqueduct  
16   going south to the Tehachapis.

17          And this goes up the Kern River flood  
18   channel up to Tulare Lake.  But it's a very wet  
19   condition when this is all happening, and when  
20   we're recharging in Rosedale.  Next slide.

21          This kind of gives you a feel for all  
22   the wet areas in Kern County during these types of  
23   years when we'd be recharging in Rosedale.  Here's  
24   the new ponds, and all these colored areas are  
25   recharged ponds that would be wet.  Kern water

1 bank here in green.

2 The west Kern Buena Vista program here,  
3 which the Commission might be familiar with on  
4 other projects -- we're a party with that program  
5 there -- is in this area. The city's 2,800 acres  
6 and Kern County Water Agency has a project up in  
7 this area - the color didn't come out well on the  
8 wall, but in this area.

9 So all in all, this historic Kern River  
10 fan, which was in farming in the, probably late  
11 70's, has now been converted to seasonal wetlands  
12 recharge programs to the tune of about 15,000  
13 acres. So it's a really neat conversion of land  
14 for environmental benefits and water supply  
15 benefits. It's really something to see in a wet  
16 season. Next slide.

17 This is a picture of that area from the  
18 air, looking towards the California Aqueduct. And  
19 just see all the water that's around. And when we  
20 recharge Rosedale again, it'd be in a year  
21 typically 140 percent of normal, there's water all  
22 over the place and we're trying to put it to  
23 beneficial purposes. Next slide.

24 This is the same photo, almost, in a  
25 different type of year. Obviously there's years

1 during the famine when we're not recharging along  
2 the channel, and it's a very dry uplands type  
3 area. So it changes dramatically over the  
4 different types of seasons. Next slide.

5 This is just kind of a program summary  
6 about groundwater recharging in Kern County.  
7 Generally and specifically to our program. The  
8 photo in the background -- actually, we have a  
9 partnership with the Tule Elk State Park, where we  
10 use some of the sloughs in the park for  
11 groundwater recharge. And it's a lot of fun to  
12 see, the elk don't get water unless we're  
13 recharging out there, and that's what they're all  
14 about, hence the name.

15 But groundwater banking programs have  
16 proven to be environmentally friendly.  
17 Groundwater impacts of local banking programs have  
18 been mitigated via cooperative MOU's amongst all  
19 the local groundwater districts, and the banking  
20 programs that have come in. It's a really good  
21 process to go through.

22 We have extreme amounts of technical  
23 people that are working on this process on a day-  
24 to-day basis to make sure that those impacts are  
25 dealt with and actually prevented ahead of time.

1           And as we've talked previous,  
2 groundwater banking programs put flood water to  
3 beneficial uses, and this has been encouraged over  
4 and over again, not just by the state legislature  
5 but also by the voters of California.

6           Just one of the last points. It's kind  
7 of interesting in these projects. We actually use  
8 the water twice. We use it once as we're putting  
9 it in, and the environment gets a benefit to that.  
10 And then when we recover it to our customers they  
11 get to use it for a benefit for municipal  
12 industrial uses.

13           One of the secondary benefits that we  
14 have realized through operating these programs now  
15 for about ten years is, as we generate revenues  
16 we're able to go buy supplies, like interruptible  
17 supplies on the state water project, that are  
18 surplus to the delta's needs, and there's ample  
19 pumping capacity.

20           We'll be able to go out and purchase  
21 those supplies and recharge those, and benefit the  
22 elk and all the other wildlife that enjoy the  
23 recharge areas. Without the revenues generated by  
24 these transfers we are unable to do that with our  
25 own farmers' financial resources.

1           MR. CROSSLEY: I guess in summary I'd  
2 like to just point out that, as the Tesla people  
3 have already alluded to, we've been dancing with  
4 them for a couple of years, and we worked hard and  
5 we've had meetings in Orange County and  
6 Bakersfield -- hell, we even got them to come to  
7 Bakersfield quite a few times -- and so we've  
8 dealt with a lot of extremely difficult issues,  
9 and we've put together a program and tailored an  
10 agreement that would meet their reliability needs.

11           And that was, you know, that's no easy  
12 task. And so we've invested a lot of hard work,  
13 and our program was going to happen, and was  
14 happening independent of Florida Power's needs,  
15 but they were one of the first people that we were  
16 in touch with.

17           And so we were able to kind of go  
18 through the process together, and it was kind of  
19 funny because issues would come up with the  
20 Commission which would take the spotlight, and  
21 then the Commission process looked pretty good,  
22 and the spotlight would focus on Kern County.

23           Well, is it going to happen down in Kern  
24 County? So we went through this process together,  
25 and our desire is to keep the process going, and



1 we would love to have Florida Power as our first  
2 customer. We think we've put together a program  
3 that satisfies a lot of different constituencies.

4 HEARING OFFICER GEFTER: Let me ask Mr.  
5 Galati, this powerpoint presentation, I want to  
6 mark the paper version of it as exhibit 157. Is  
7 Applicant sponsoring this?

8 MR. GALATI: Yes. I'd like to sponsor  
9 157 into evidence.

10 HEARING OFFICER GEFTER: Let's -- is  
11 there any objection to receipt of this powerpoint  
12 presentation into the record?

13 MS. HOUCK: No, just with the  
14 understanding we may have some questions about the  
15 shrew next week.

16 HEARING OFFICER GEFTER: Certainly.

17 HEARING OFFICER GEFTER: Any objections?

18 MR. BOYD: We have no objections.

19 HEARING OFFICER GEFTER: All right.  
20 Exhibit 157, which is the powerpoint presentation,  
21 paper version, for the Buena Vista Rosedale-Rio  
22 Bravo water banking and recover program, is now  
23 received into the record.

24 And then I have a question for whomever  
25 of the panel wishes to answer the question. And

1     this is a summary of my understanding of what  
2     you're selling to Tesla Project, and tell me if  
3     this is an accurate summary.

4             Which is that water normally allocated  
5     for delivery to the Buena Vista district and the  
6     Rosedale-Rio Bravo district would instead be given  
7     to the Tesla Power Plant at the Zone 7 turnout.  
8     And then it would be made up by drawing  
9     groundwater from your bank water storage. Is that  
10    the summary?

11            MR. CROSSLEY: That's almost correct.  
12    We're going to facilitate the exchange using our  
13    state supply, okay, but the water, the actual  
14    water, is high flow flood water that would have  
15    been lost to Kern County and ultimately would have  
16    caused more damage than good.

17            MR. MCMURTREY: If I might, if I can  
18    just elaborate on that a little bit, because I  
19    think it goes somewhat to this reliability  
20    question. That is, the high flow Kern River water  
21    that we're technically selling to the plant we  
22    have in place and will have in place, can have in  
23    place.

24            We think it is 100 percent reliable  
25    supply. We feel so confident about that that in

1     our negotiations with Tesla we have essentially  
2     agreed that long-term drought will not be a force  
3     majeure event.  Therefore it will not relieve us  
4     of our obligations to supply water.

5             In addition to that there are two sides  
6     of reliability.  One is getting it in the ground,  
7     and we have most of it in the ground and certainly  
8     will have the rest.  We actually have more than  
9     the 81,000 acre-feet already in the ground, we  
10    just didn't want to commit more than 81,000 at  
11    this time to Tesla.

12            But the other reliability side is that a  
13    delivery has to be made of that water to Tesla.  
14    And the way we do that is, we pump the water as  
15    you just said, our landowners pump the water.  And  
16    instead of receiving their state supply at the  
17    district boundaries, that state supply, to the  
18    tune of 6,000 acre-feet or thereabouts, goes to  
19    Tesla.

20            We do that by an internal exchange with  
21    the Kern County Water Agency.  The Kern County  
22    Water Agency is a state project contractor.  They  
23    have approximately 25 percent of the state water  
24    project supply, which is about a million acre-  
25    feet.

1           Our individual district supplies are  
2 included within that million acre-feet. Our  
3 arrangement with the agency is that they will  
4 supply to Tesla, from the agency's supply, the  
5 water that they need. And they will charge it  
6 against our pro-rata share of the agency's supply.

7           Which is why we feel that the  
8 reliability for the water supply in the state  
9 project is, in my opinion, it's 100 percent.  
10 Because they really have access to all of the  
11 agency supply. And then that can be manipulated  
12 internally in Kern County.

13           For example, we can pump water to Bolita  
14 Ridge. And have the agency deliver Bolita Ridge  
15 water. I mean, there are ways for us to make sure  
16 that whatever agency supply they have in any given  
17 year can be available to Tesla to meet this  
18 contractual commitment.

19           It really requires the state -- for us  
20 not to supply the water it almost requires the  
21 state project to not operate. I mean, if you shut  
22 down the state project, if there was an earthquake  
23 and you couldn't move water through the state  
24 project, something like that, a catastrophe of  
25 that magnitude, it would be the only way that a

1 force majeure event would prevent us from  
2 delivering water.

3 And I might add that with reliability  
4 goes cost. We've looked at lots of sale programs.  
5 We need money to build facilities and buy water to  
6 solve our overdraft. We have to be creative  
7 because we are being shorted on our state project  
8 supply out of the delta.

9 And we don't want to put any more  
10 pressure on the state project, we don't want to  
11 put any more pressure on the delta, so we're being  
12 creative in Kern County, selling dry year water  
13 for a high price and then using that money to  
14 build facilities and buy other water supplies.

15 In order for us to get that high price  
16 we've done everything we possibly can do to make  
17 this a very, very reliable supply. And we think  
18 those two go hand in hand.

19 HEARING OFFICER GEFTER: Any cross-  
20 examination of the witnesses?

21 MS. HOUCK: Staff has some contract-  
22 related questions. I think Mr. Galati indicated  
23 earlier that Mr. Osias would be the best person to  
24 address those to tomorrow. So I would just want  
25 to clarify that he would be able to address --

1           MR. OSIAS: I may not be here tomorrow.

2           And Mr. McMurtrey is the other side of the  
3           contract, so I think he'd be a good person to ask.

4           MR. GALATI: Yes, I agree that you could  
5           ask Mr. McMurtrey contractual questions to the  
6           extent that he can answer.

7           HEARING OFFICER GEFTER: And again, this  
8           is -- this would be an attorney asking an  
9           attorney, so this would be more or less a legal  
10          argument in the long run. So I need to figure out  
11          what sort of questions you have and can you ask  
12          them of the witnesses.

13          MS. HOUCK: They're questions related to  
14          whether there is an actual contract in place, and  
15          what process would need to occur for the water to  
16          actually physically be delivered to the power  
17          plant.

18          HEARING OFFICER GEFTER: Okay, it seems  
19          that the witnesses could answer that as well, we  
20          could try that first.

21          MR. MCMURTREY: If you'd rather hear  
22          from the witnesses, so -- I mean, I can tell you  
23          that there is a contract that has been, a draft of  
24          a contract that's still in the process of being  
25          negotiated. But it's in fairly final form, but it

1 has not been signed, and cannot be signed until a  
2 decision has been made as to whether or not ours  
3 is the water supply.

4 Our contract, as negotiated, requires  
5 the Applicant to pay for the water over a 35  
6 year -- I'll correct that, it's actually through  
7 2035, but can be extended to 2050. Anyway, it  
8 requires them to pay -- once they sign that  
9 contract they are required to buy the water. So  
10 they won't sign the contract.

11 MS. HOUCK: In order to physically  
12 deliver the water to the power plant site how many  
13 levels of contracts would need to be negotiated.  
14 Do you know? In order for you to physically get  
15 the water to them you're going to be diverting  
16 state water project water upstream, is that  
17 correct?

18 MR. MCMURTREY: We have everything in  
19 place in Kern County, my understanding, including  
20 the exchange agreement with the Kern County Water  
21 Agency. My understanding is the only thing that  
22 needs to be put into place in order to make the  
23 delivery out of the aqueduct to zone 7 would be a  
24 point of delivery agreement.

25 That has been suggested, and that's

1     between the agencies, zone 7 and DWR. It has been  
2     suggested that perhaps zone 7 would want to  
3     contract directly with us as opposed to us  
4     contracting directly with Tesla. And we're not  
5     opposed to that, it's just a new suggestion that  
6     maybe would require us to expand our current draft  
7     of Tesla contract.

8             MS. HOUCK: So there's some uncertainly  
9     as to the terms of the contract as to the physical  
10    delivery of the water? I mean, is there any  
11    uncertainty --

12            MR. BARTEL: No. Those are pretty  
13    standard agreements. We've had the three EWA  
14    sales that I alluded to in the presentation. Each  
15    one of those requires a change of point of  
16    diversion agreement. Standard agreements that are  
17    done all the time, whenever we move our water from  
18    one state water contractor to another. It happens  
19    all the time.

20            I know zone 7 is a member of the semi-  
21    tropic banking program, which is our neighbor, and  
22    they have change of point in delivery agreements  
23    to get their water down to semitropic, and then  
24    back from semitropic and back. So it's a pretty  
25    standard operating procedure. No, the agreements



1 have not been executed, but it's something that  
2 happens all the time, and we don't foresee any  
3 issues there.

4 MR. MILOBAR: You don't really have to  
5 -- the terms are there. I mean, you just take  
6 what's existing in that type of contract, change  
7 the names, institute the program with zone 7, and  
8 it's done. It's not something that has to be  
9 actually negotiated, just the process has to be  
10 understood and put into writing.

11 MS. HOUCK: But you don't currently have  
12 an agreement with zone 7 at this time?

13 MR. MILOBAR: No, because as Gene  
14 explained, until we are the water supply and these  
15 contracts start flowing, then you've got to do  
16 that.

17 MS. HOUCK: But I thought I understood  
18 that you just said there was some confusion about,  
19 or question about how the water would be  
20 delivered. Whether there would be a direct  
21 contract between Kern County and zone 7.

22 MR. MCMURTREY: That was just brought up  
23 today, at least to me, it's the first time I heard  
24 it, that zone 7 might prefer that we take the  
25 Tesla contract that's already been negotiated,

1 let's say, and insert zone 7 as the buyer, with  
2 zone 7 then being a reseller, a resaler, whatever  
3 that word is, to Tesla.

4 That was suggested, and our response was  
5 we don't have any particular objection to that.  
6 We don't want to stop the process that we're in or  
7 slow it down if we can help it. But there's  
8 always been a working, a public agency to a public  
9 agency, we like that concept.

10 MS. HOUCK: Let me ask if there is a  
11 representative to zone 7 here, and you could be  
12 sworn, and then we would ask if you can answer  
13 that question?

14 HEARING OFFICER GEFTER: will the  
15 reporter please?  
16 Whereupon,

17 VINCENT WONG  
18 was called as a witness herein, and after first  
19 having been duly sworn, was examined and testified  
20 as follows:

21 HEARING OFFICER GEFTER: Please state  
22 your name and spell it. You need the microphone,  
23 would you hand him the mike? Thank you.

24 MR. WONG: My name is Vincent Wong, V-i-  
25 n-c-e-n-t W-o-n-g, Assistant General Manager with

1 the zone 7 Water Agency. Do you need background  
2 information about me?

3 HEARING OFFICER GEFTER: No, if you  
4 could just respond to the question that Ms. Houck  
5 asked?

6 MR. WONG: Right. We've been  
7 negotiating and talking with the Applicant on the  
8 basis that the water supply source coming from  
9 Rosedale-Rio Bravo and Buena Vista would be an  
10 agency-to-agency transfer from the Rosedale-Rio  
11 Bravo Buena Vista to zone 7.

12 The Tesla Power Project site is located  
13 physically within the zone 7 boundary lines. Zone  
14 7 is a water supply contractor. Our contract with  
15 the state provides that any water delivered by the  
16 state water project needs to be approved by zone  
17 7. So, in that case we see zone 7 as being the  
18 water supplier, using the water supply source from  
19 the Rosedale-Rio Bravo and Buena Vista.

20 The most important part is identifying  
21 the source of water, which the Rosedale-Rio Bravo  
22 and Buena Vista folks have done. They've agreed  
23 to have that water supply source available. The  
24 water supply contract that the Tesla Power Plant  
25 would need with zone 7 has not been negotiated,

1 but we believe that contract or that agreement can  
2 be negotiated and completed by the time water is  
3 needed for the plant.

4 MS. HOUCK: Earlier on, during these  
5 proceedings, zone 7 expressed some concerns  
6 regarding the proposed water supplies. Have those  
7 concerns been addressed?

8 MR. WONG: Yes they have. We've had an  
9 independent consultant review the -- review two  
10 things. Review the water supply source, as far as  
11 its availability and transferability to our area.  
12 We're satisfied that that can be done.

13 We also have asked for review on impacts  
14 on zone 7 and, via the south bay aqueduct,  
15 contractors with having a new water supply  
16 delivery point at the Tesla Power Plant. And  
17 although there are some impacts we believe that  
18 those impacts are acceptable to us.

19 MS. HOUCK: And you stated a moment ago  
20 that you believe that the issues have been  
21 resolved to a point where the contract could be  
22 reached?

23 MR. WONG: Yes, that was in a letter we  
24 sent to you July, or August 27, I believe.

25 MS. HOUCK: And about how long, about

1     what time frame do you think that a contract could  
2     be reached with the Applicant?

3             MR. WONG:  It could happen in a matter  
4     of months, it could happen in a year or two,  
5     certainly before the plant startup is -- certainly  
6     before they will install or commit to the turnout  
7     facility that would need to be built.  Which I  
8     imagine we'd have in a couple of years or so.

9             HEARING OFFICER GEFTER:  Is that letter  
10    that Mr. Wong just referred to, is that exhibit  
11    70?  A letter from the Alameda County Flood  
12    Control and Water Conservation District zone 7,  
13    and then I also have a letter -- also part of  
14    exhibit 70 -- a letter from Contra Costa Water.

15            MR. GALATI:  I have it identified as  
16    exhibit 30.

17            HEARING OFFICER GEFTER:  You do, okay,  
18    why don't we use exhibit 30.  It's the same letter  
19    we're referring to?

20            MR. GALATI:  Yes, exhibit 30 is the  
21    letter from Vincent Wong to Jack Caswell, dated  
22    August 27, 2003.

23            HEARING OFFICER GEFTER:  We'll change it  
24    from 70 to 30.

25            MS. HOUCK:  And if contract terms are

1 reached with the Applicant would there need to be  
2 any additional governmental approvals prior to  
3 adoption of the contract?

4 MR. WONG: Well, zone 7 would need to  
5 approve the water supply agreement serving the  
6 project. There's also a number of other  
7 agreements that would need to be approved.

8 We talked about the point of delivery  
9 agreement that the state Department of Water  
10 Resources would need to approve. And then the  
11 contractual arrangements between zone 7 and the  
12 Rosedale-Rio Bravo Buena Vista.

13 MS. HOUCK: So there are still a number  
14 of outstanding agreements that would need  
15 agreement prior to delivery of the water?

16 MR. WONG: Yes.

17 MS. HOUCK: Thank you.

18 HEARING OFFICER GEFTER: I have a  
19 question for someone on the panel. What is the  
20 role of the Kern County Water Agency in terms of  
21 contractual relationships? Does Kern County have  
22 to sign an agreement with any of the parties?

23 MR. CROSSLEY: Yes. Kern County Water  
24 Agency has the prime contract with the state. And  
25 then there's about 15 member units -- of which our

1 two districts are two -- that are kind of like  
2 subcontractors through the water agency. So we  
3 have a contract with the agency, the agency has a  
4 contract with the state.

5 HEARING OFFICER GEFTER: But does the  
6 agency in this case, with respect to this deal  
7 that you have with Tesla, does the Kern County  
8 Water Agency have to sign any of the contracts?

9 MR. CROSSLEY: Probably the --

10 MR. BARTEL: Point of delivery  
11 agreement.

12 MR. MCMURTREY: All the point of  
13 delivery agreement does is that it says that  
14 instead of delivering agency water at Tuppon (sp)  
15 in Kern County, they'll deliver it at a different  
16 location.

17 HEARING OFFICER GEFTER: And that's the  
18 turnout, the zone 7 proposed turnout?

19 MR. MCMURTREY: Yes. But they'd be a  
20 signatory to that document. And they're willing,  
21 by the way.

22 HEARING OFFICER GEFTER: So that point  
23 of delivery contract would involve zone 7, Kern  
24 County Water Agency, the two water storage  
25 districts, --

1 MR. MCMURTREY: And DWR.

2 HEARING OFFICER GEFTER: -- and DWR.

3 MR. BARTEL: Actually, technically, the  
4 parties would be DWR, zone 7, and the Kern County  
5 Water Agency. We would have, we do a simple  
6 letter agreement covering that agreement between  
7 Buena Vista and Rosedale and the Kern County Water  
8 Agency. We just executed one of those for 2003 --  
9 environmental water account agreement. It's a  
10 page and a half.

11 MR. CROSSLEY: These agreements happen  
12 all the time. Metropolitan banks a lot of water  
13 in Kern County.

14 HEARING OFFICER GEFTER: Do you have any  
15 further cross-examination?

16 MS. HOUCK: Mr. Wong, are there any  
17 other approvals or environmental reviews that DWR  
18 would need to do to construct the turnout?

19 MR. WONG: Not that I'm aware of. We've  
20 had them do -- well, they will have to check to  
21 make sure all the CEQA departments are taken care  
22 of. Turnouts generally are handled as an  
23 improvement, but as a minor project. In which  
24 case they would either look at the CEC, the FSA,  
25 as the equivalent to that.



1 MS. HOUCK: Thank you.

2 HEARING OFFICER GEFTER: Does that  
3 conclude your cross-examination of these  
4 witnesses? Okay, off the record.  
5 (Off the record.)

6 HEARING OFFICER GEFTER: Ms. Houck, you  
7 may continue your cross-examination.

8 MS. HOUCK: I have a couple of questions  
9 for Mr. Wong, and then two or three questions for  
10 the districts. In regards to your contract that  
11 you're negotiating with the Applicant, is there  
12 going to be a cost for delivery of the water by  
13 zone 7?

14 MR. WONG: In that agreement the  
15 Applicant is to cover all the cost to zone 7,  
16 whether it be cost of the water supply, as it  
17 would come from Rosedale-Rio Bravo and Buena  
18 Vista. Also whether it be costs from the  
19 Department of Water Resources in the point of  
20 delivery.

21 There is also going to be a  
22 reimbursement for all the costs that zone 7 incurs  
23 in the administration of the contract, plus a two  
24 and a half million dollar mitigation -- I won't  
25 say a mitigation fee, but we had identified

1 certain impacts with a new turnout in terms of  
2 reduced reliability during certain emergency type  
3 situations.

4 This is all documented in the report  
5 that CH2M Hill did. We believe that those impacts  
6 would be offset by the two and a half million  
7 dollar payment. Zone 7 is not obligated to use  
8 that money specifically for improvements, and will  
9 not use that money for the Tesla Power Project,  
10 but will use that money instead to build  
11 mitigation or redundant facilities within our area  
12 to meet our customers' needs.

13 MS. HOUCK: And the water that is being  
14 delivered from Kern -- the Kern County  
15 representatives indicated that the water that they  
16 are actually selling is going to be banked  
17 groundwater, is that correct?

18 MR. WONG: That's correct.

19 MS. HOUCK: But the water that's going  
20 to be delivered at the turnout will be physically  
21 state water project water, is that correct?

22 MR. WONG: It will be delivered by  
23 exchange, yes.

24 MS. HOUCK: As far as DWR's table A and  
25 priority levels, will that water be considered

1 state water project water, or some other type of  
2 water, non-project water?

3 MR. WONG: My understanding on that is  
4 that it would be non-project water, but in terms  
5 of priority it would be delivered to zone 7 by  
6 Rosedale-Rio Bravo and Buena Vista, not taking  
7 their higher priority table A amounts. And in not  
8 taking that amount that frees up the capacity to  
9 deliver this non-project water to zone 7.

10 MR. MILOBAR: Yes, I think it is a  
11 fairly technical question that you're answering,  
12 and from our perspective, the districts, we are  
13 paying for our state water as we normally do. The  
14 only difference is it's dropped off before it gets  
15 to Kern County.

16 So we still look at that as being state  
17 water. In the eyes of the department it's state  
18 water that's within the agency's contract. And so  
19 the technical aspects that it is, the source water  
20 is actually banked groundwater, is, you know,  
21 that's just something that --

22 MR. CROSSLEY: But the priority is the  
23 same.

24 MR. MILOBAR: -- is going to be  
25 resolved. The priority and everything. As far as

1 we're concerned it's our state project water  
2 that's being delivered there that was created in  
3 the Applicant's -- Gene, you want to --?

4 MR. MCMURTREY: Yes, actually I thought  
5 it was project water, so I suppose I would  
6 disagree with Vincent's characterization. I  
7 believe it was project water, and it will have the  
8 project water priority.

9 MR. WONG: And we'll get certainty on  
10 that once the point of delivery agreement has been  
11 negotiated.

12 MR. MCMURTREY: That's correct.

13 MR. WONG: And then we will be able to  
14 define that.

15 MS. HOUCK: I believe it was Mr.  
16 Crossley that had made a statement during the  
17 presentation regarding the benefit that Kern  
18 County would receive from banking higher quality  
19 mud flow excess water in exchange for the lower  
20 quality DWR or state water project water that  
21 would be delivered to Tesla, is that correct?

22 MR. CROSSLEY: That's correct.

23 MS. HOUCK: So Kern County believes it  
24 would be sound policy to use higher quality water  
25 for the most beneficial use?

1 MR. CROSSLEY: Right.

2 MS. HOUCK: And what would be considered  
3 the more beneficial uses?

4 MR. CROSSLEY: Most beneficial use is  
5 going into the local groundwater basin for  
6 extraction by the overlying landowners which, you  
7 know, principally could be the residents of the  
8 city of Bakersfield, the landowners in our  
9 district, the farms, the businesses.

10 That's the highest quality water we have  
11 is when you pump the water out of the ground, it's  
12 been filtered through the -- you know, you've got  
13 the high quality water to start with, and then  
14 it's being filtered down through the ground, and  
15 then you pump it back out.

16 And the cost -- like, for example, if we  
17 pump that water into the cross-valley canal in  
18 Kern County, and that water went to the treatment  
19 plant -- Kern County Water Agency treatment  
20 plant -- their treatment costs are far less  
21 because it's such high-quality water. When they  
22 have to use state water at the treatment plant  
23 their costs of treatment go up.

24 MS. HOUCK: So you believe it will be  
25 consistent then to look at using a lower quality

1 water for use by the power -- or that you think it  
2 would be beneficial to use the lower quality water  
3 at the power plant versus the use --

4 MR. CROSSLEY: Yes. There's a benefit  
5 to taking water that comes from the western  
6 Sierras, either down the friant system or the Kern  
7 River, keeping that in Kern County. That is  
8 highly encouraged in Kern County. And so state  
9 water is used by many districts for exchange  
10 purposes. The same thing as we're proposing here.

11 MS. HOUCK: Do you think there would be  
12 a benefit to water quality by having the power  
13 plant use reclaimed water from the city of Tracy  
14 versus having that water put back into the delta,  
15 contributing to the degradation of state water  
16 project water?

17 MR. GALATI: I'm going to object to this  
18 line of questioning here as not within his  
19 knowledge, whether he is going to interpret state  
20 policy. I'm not even allowed to interpret state  
21 policy here.

22 MR. CROSSLEY: I was just going to say  
23 that when I heard they were going to treat this  
24 water, they should send it right back to the delta  
25 and let it get bumped down the aqueduct, that'd be

1 a good use of it.

2 HEARING OFFICER GEFTER: Okay.

3 Actually, we're going to strike your answer. And  
4 we're going to sustain Mr. Galati's objection.

5 Okay, if you, she has a question pending, you can  
6 answer it.

7 MS. HOUCK: The Applicant indicated in  
8 its documents that there would be a \$360 per acre-  
9 foot charge for the water that they're contracting  
10 with your agency pool. Are there any  
11 contingencies or terms in that contract that would  
12 increase the cost of that water over the life of  
13 the contract?

14 MR. MILOBAR: There is an inflation  
15 component built into the contract, so that it  
16 would increase gradually according to a CPI index.

17 MS. HOUCK: Thank you.

18 HEARING OFFICER GEFTER: What is a CPI  
19 index?

20 MR. MILOBAR: That's the consumer price  
21 index, there's a number of them, and pick one  
22 that's --

23 HEARING OFFICER GEFTER: Oh, okay, I  
24 didn't know what context you were using that term.  
25 Thank you.

1 MR. MILOBAR: Sorry.

2 MS. HOUCK: Staff has no further  
3 questions for the district.

4 HEARING OFFICER GEFTER: Does the  
5 Applicant have redirect?

6 MR. GALATI: Yes. Mr. Wong, how long  
7 has the Applicant been talking with zone 7?

8 MR. WONG: Let's see, I think we go back  
9 to January 2001. Does that sound about right,  
10 David?

11 MR. OSIAS: Yes.

12 MR. GALATI: And were there a lot of  
13 meetings with DWR and zone 7 together to talk  
14 about any point of delivery or exchange agreement,  
15 and how that would work?

16 MR. WONG: I recall at least one  
17 meeting, there may have been several others.

18 MR. GALATI: Mr. McMurtrey, we've heard  
19 today that there is a point of delivery agreement  
20 and a water sale agreement, and possibly now, as  
21 described by Mr. Wong, a third agreement that  
22 deals with the water supply agreement with zone 7.  
23 Can you give us your opinion about the point of  
24 deliver agreement, and describe for us what that  
25 is?



1           MR. MCMURTREY: I think I mentioned  
2 earlier. A point of delivery agreement is a  
3 standard form agreement that merely changes the  
4 point of delivery of a state contractor's water  
5 supply. And we do them with great regularity.

6           I don't think it, really, it never has  
7 been a problem getting a point of deliver  
8 agreement, and I don't think there would be in  
9 this instance. So I, I mean, I don't know what  
10 else you need to know about it, it's pretty  
11 standard.

12           MR. GALATI: Do you think it would take  
13 months to enter into a point of delivery  
14 agreement?

15           MR. MCMURTREY: Oh, no, I'm thinking  
16 days, not months.

17           MR. GALATI: Mr. Wong, with respect to  
18 your testimony with the water supply agreement  
19 with zone 7, it's my understanding that the  
20 purpose of that agreement would be if Rosedale-Rio  
21 Bravo and Buena Vista would actually sell the  
22 water to you, then you would enter into an  
23 agreement to give the water to us?

24           MR. WONG: That's correct. We would not  
25 give, but sell the water to you.

1           MR. GALATI: And hasn't the terms --  
2 above and beyond passing through the cost --  
3 haven't the terms of that agreement already been  
4 negotiated with the Applicant with the impact fee  
5 and those terms. Haven't they essentially been  
6 negotiated?

7           MR. WONG: We have an understanding on  
8 those, yes.

9           MR. GALATI: And basically there's a  
10 contract already pending between the two legal  
11 counsels, working up the final language?

12          MR. WONG: A draft contract has been  
13 made. I think we're still in the process of  
14 exchanging edits of that.

15          HEARING OFFICER GEFTER: Okay. We can  
16 certainly provide more in our testimony, but I  
17 don't believe that I have any additional cross-  
18 examination for these witnesses.

19          HEARING OFFICER GEFTER: Thank you. Mr.  
20 Boyd, cross-examination?

21          MR. BOYD: Yes. I just have a few  
22 questions. One of you said a word that kind of  
23 set off a red flag. It all sounds good, except  
24 for somebody said the word "overdraft." Are any  
25 of the areas that we're talking about subject to

1 any overdraft?

2 MR. BARTEL: If I may --

3 MR. BOYD: And what was that referring  
4 to when you said that?

5 MR. BARTEL: Well, the county of Kern --  
6 the southern San Joaquin Valley groundwater basin  
7 within the county of Kern, if you take all of the  
8 activities together, does result in annual  
9 overdraft. However, there is no contribution to  
10 overdraft by any of the activities of the Buena  
11 Vista Water Storage District.

12 In fact, our analysis shows that, since  
13 1962, that district has put approximately 1.7  
14 million acre-feet of surplus water into the basin.  
15 Approximately five to 600,000 acre-feet of that is  
16 from high flow Kern River water in the last seven  
17 years, and that's the water supply that we're  
18 proposing to use in meeting the commitments to  
19 Tesla.

20 And what Rosedale, Rosedale is not in  
21 overdraft, but they may be close to the mark,  
22 something like that. But the fact is that they're  
23 not supplying any of the water for the sale. They  
24 are simply supplying some of the recharge -- all  
25 of the recharge and some of the recovery

1 facilities -- and then all of the water is being  
2 supplied by Buena Vista, which is in surplus.

3 MR. MCMURTREY: If I may, I think this  
4 has been submitted in the final EIR, table 3. In  
5 that document, those documents detail groundwater  
6 balance of Buena Vista Water Storage District --

7 HEARING OFFICER GEFTER: That's exhibit  
8 15.

9 MR. MCMURTREY: Yes, and I believe  
10 there's also documents -- table 5 for Rosedale-Rio  
11 Bravo Water Storage District.

12 MR. BOYD: So would it be safe to say  
13 that the source district of this water is not in a  
14 state of overdraft?

15 MR. MCMURTREY: Correct.

16 MR. CROSSLEY: And then just to add one  
17 more thing. It was mentioned that we have MOU's,  
18 memorandums of understanding among the entities in  
19 Bakersfield and Kern County. And those MOU's call  
20 for any water put into a banking program that 11  
21 percent of that water will be left behind. So the  
22 basin is always advantaged in all these programs.

23 MR. BOYD: Okay. And then my only other  
24 question is have any of these entities provided  
25 any kind of will serve letter to the Applicant?

1 Do they have a will serve letter from anybody, is  
2 what I'm getting at?

3 MR. MCMURTREY: I don't think, in the  
4 strict sense of the term "will serve", like a  
5 water purveyor to a new home or something like  
6 that. We certainly have provided a will serve  
7 commitment if you will in the form of our years of  
8 negotiations and our willingness, even today, to  
9 sign an agreement right now, as soon as they are  
10 ready.

11 MR. BOYD: And to your knowledge --

12 MR. MCMURTREY: Oh, excuse me, one other  
13 thing. We've also provided a will serve  
14 commitment in the form of the 81,000 acre-feet  
15 that have been committed to the project, which is  
16 in the ground, ready to go.

17 MR. BOYD: To your knowledge, do they  
18 have such an agreement or some kind of stipulation  
19 from the city of Tracy regarding their water as  
20 well?

21 HEARING OFFICER GEFTER: Okay, I'll just  
22 strike that.

23 MR. BOYD: And if you don't know, just  
24 say no.

25 HEARING OFFICER GEFTER: That question

1 is stricken.

2 MR. BOYD: Okay, that's fine.

3 HEARING OFFICER GEFTER: Okay, are you  
4 done? Mr. Sarvey, are you ready?

5 MR. SARVEY: Yes. Mr. Wong, I attended  
6 a meeting several months ago where Tesla made the  
7 same presentation to your board. And at that  
8 meeting several board members expressed  
9 reservations about this project. And I have three  
10 questions.

11 One, has your board approved this  
12 project at this time?

13 MR. WONG: No they have not.

14 MR. SARVEY: And can you relay to the  
15 Committee what reservations that your board had  
16 expressed at that meeting?

17 MR. WONG: I think the reservation was  
18 related more to the lack of information as to the  
19 terms of delivery of what was expected of zone 7.  
20 As I mentioned before, zone 7 did have some  
21 concerns with the new turnout on the California  
22 Aqueduct. We believe now though that the impacts  
23 that were identified are acceptable to us.

24 MR. SARVEY: And at that meeting you  
25 expressed support for Tracy recycled water. What

1 has changed your opinion on that matter?

2 MR. WONG: We still support the  
3 appropriate and proper use of recycled water. We  
4 have not changed our opinion on that.

5 MS. SARVEY: Thank you very much. I'd  
6 like to have questions to Rosedale please.

7 HEARING OFFICER GEFTER: Could you speak  
8 up, Mr. Sarvey.

9 MR. SARVEY: I'm sorry, this may not be  
10 on. I'm sorry. If the state project is cut back,  
11 you guarantee delivery to the Tesla Project,  
12 correct?

13 MR. CROSSLEY: Correct.

14 MR. SARVEY: Now what happens to the  
15 users between Tesla's turnout and where you put  
16 the water back into the aqueduct. Do they suffer  
17 reductions due to Tesla's water use?

18 MR. CROSSLEY: Would you repeat that  
19 question?

20 MR. SARVEY: I said what happens to  
21 users between the Tesla turnout, and where you put  
22 the water back into the aqueduct? Do those users  
23 suffer as a result of that reduction?

24 MR. CROSSLEY: Like Mr. McMurtrey  
25 explained, the Kern County water Agency has a

1 million acre-feet under contract. So if the  
2 project was cut back to ten percent, ten percent  
3 allocation, Kern County still has ten percent  
4 water supply.

5 That water would physically go to the  
6 Tesla plant. We would pump the water out of the  
7 ground that we've stored in Kern County, and  
8 deliver it to whoever they wanted.

9 MR. SARVEY: I think basically what I'm  
10 saying is that there's X amount of water coming  
11 into the aqueduct. And I'm between here and --  
12 their turnout and your project. Where does the  
13 extra water come from, that's basically the  
14 question I'm asking?

15 MR. BARTEL: Would you like me to  
16 answer?

17 MR. SARVEY: Sure.

18 MR. BARTEL: When we directly pump into  
19 the aqueduct there's plenty of downstream demands  
20 that pick that water up. We're pumping in five to  
21 eight CFS, which is a very trivial amount in the  
22 California Aqueduct.

23 There's probably at any one time 1,000  
24 CFS of demand downstream. So they pick that up,  
25 and hence a less amount of water is diverted into



1 the aqueduct, so the demand is reduced.

2 MR. SARVEY: I don't understand that  
3 theory.

4 MR. BARTEL: So the power plant is  
5 diverting five CFS up at their turnout at zone 7.  
6 We're turning in five CFS in Kern County that  
7 somebody downstream is picking up and not  
8 diverting a like amount of state project water.

9 MR. SARVEY: I'm not talking about the  
10 people downstream, I'm talking about the people  
11 between the turnout and between where you're  
12 putting water back in there. Aren't those the  
13 people that get cut back if the state water  
14 project gets gutted?

15 MR. CROSSLEY: No, like I explained, the  
16 Kern County Water Agency, even at a ten percent  
17 allocation they still have 100,000 acre-feet  
18 coming down the aqueduct. So that, a little piece  
19 of that 100,000 acre-feet goes to the power plant,  
20 we pump a commensurate amount out of the  
21 groundwater basin in Bakersfield, and deliver it  
22 to one of the contractors who, you know, water  
23 that's going to go --

24 MR. MILOBAR: There are no impacts to  
25 any other users that aren't a part of this

1 program. And anybody that is involved in the  
2 program, these exchanges facilitate filling the  
3 same identical demands with or without the  
4 program.

5 So there's no impacts. If you have to  
6 pump some in and trade some water off upstream,  
7 still the same users get the same amount of water  
8 that they order. There's no missing water in the  
9 system. Everybody between still gets their water.

10 We don't touch their water, all the  
11 people in-between have their own rights to that  
12 water, and they're delivered -- their demands --  
13 according to their water orders.

14 MR. MCMURTREY: If I might help out  
15 here. The state project water is either going to  
16 come out of the aqueduct at the zone 7 turnout, or  
17 it's going to come out at Tuppan at the Kern  
18 County turnout. It's not ever going to be taken  
19 somewhere in-between or used in-between or benefit  
20 in-between some user.

21 So, if under our arrangement we're  
22 giving water to zone 7 and it comes out at the  
23 zone 7 turnout, that will not adversely impact any  
24 user below that point, except us. It's our water  
25 that we didn't take out. The aqueduct is lined,

1 and, you know, there's no diversions of that water  
2 between our turnout and zone 7.

3 MR. BARTEL: Buena Vista is between the  
4 Kern water bank and the delta. And they make  
5 diversions all over those areas. So we're one of  
6 those in-between districts, and we have never,  
7 ever been impacted and not gotten the water we've  
8 ordered. So I would answer the question no,  
9 there's no possibility of impact due to that  
10 operation.

11 HEARING OFFICER GEFTER: Mr. Sarvey, do  
12 you have any further questions?

13 MR. SARVEY: No, I'm done. Thank you.

14 HEARING OFFICER GEFTER: At this point  
15 I'm going to ask the Applicant whether you want to  
16 move exhibits 15 and 30 and 157 into the record?

17 MR. GALATI: Yes.

18 HEARING OFFICER GEFTER: Okay. Any  
19 objection to receipt of those exhibits?

20 MS. HOUCK: No.

21 MR. SARVEY: No objection.

22 HEARING OFFICER GEFTER: At this point  
23 exhibits 15, 30 and 157 are received into the  
24 record, related to water resources. Do you have  
25 any additional testimony ont his water plan?

1           MR. GALATI: I don't have any additional  
2 testimony that won't do with my experts. But I  
3 would ask leave of the Committee, there was an  
4 issue raised on Mr. Sarvey's cross-examination  
5 that was not raised on direct that I'd like one  
6 question.

7           HEARING OFFICER GEFTER: Okay, redirect.

8           MR. GALATI: Yes. Mr. Wong, regarding  
9 the board meeting in which the board expressed  
10 reservations -- you recall that testimony to Mr.  
11 Sarvey about expressing reservation? Was that  
12 before or after the Applicant and zone 7 agreed on  
13 the mitigation fee?

14          MR. WONG: That was before.

15          MR. GALATI: Thank you.

16          HEARING OFFICER GEFTER: Okay. At this  
17 point you have no further testimony on this  
18 particular issue, the water supply plan?

19          MR. GALATI: I have no further testimony  
20 from these witnesses, but my witnesses will  
21 testify to portions of the water supply plan, that  
22 I can't ask these guys, but I'll ask my guys,  
23 so --.

24          HEARING OFFICER GEFTER: All right.  
25 Let's go off the record.

1 (Off the record.)

2 HEARING OFFICER GEFTER: Back on the  
3 record. The Applicant asked another question on  
4 redirect for the water district, since the  
5 witnesses will not be here tomorrow. So Mr.  
6 Galati, please go ahead.

7 MR. GALATI: Yes, and I'll just ask this  
8 to the panel, whoever can best answer it, whether  
9 it's Mr. Bartel or Mr. Crossley. You stated that  
10 you have been working with Tesla for quite some  
11 time. Have you spent a lot of time and resources  
12 towards entering into this contract?

13 MR. CROSSLEY: Yes we have. I know at  
14 least \$200,000 in doing the EIR to address, you  
15 know, some of the specifics that we needed to  
16 comply with down in Kern County, then, you know,  
17 all the travel expenses, all of the staff time and  
18 everything, so -- if somebody else wants to  
19 amplify?

20 MR. MCMURTREY: Plus the water  
21 reliability studies that we did. All the  
22 analysis. I think we've been at this a couple of  
23 years -- you think more? And I can tell you from  
24 the billing side that they've spent a lot of  
25 money.

1 (laughter)

2 MS. HOUCK: I would object to the last  
3 statement. I don't know that there's any  
4 relevance to how much money or time that Kern  
5 County has put into negotiating a contract for a  
6 project that is still in the process of being  
7 permitted before the Commission.

8 HEARING OFFICER GEFTER: The relevance  
9 is questionable, I think we're going to sustain  
10 the objection and particularly strike the last  
11 answer about the billing to the attorney.

12 MR. MCMURTREY: Can I offer the proof of  
13 the relevance? The offer of the proof of the  
14 relevance is that the same offer that had been  
15 expressed not in the record but in a workshop that  
16 other agencies could spend time and money and  
17 effort and not come out in the end.

18 So, again, that would be the relevance,  
19 and I think it's important for the Committee to  
20 know that there has been significant amount of  
21 work done on this area.

22 HEARING OFFICER GEFTER: We understand  
23 that, and the Applicant has indicated that to us.  
24 But with respect to that particular question and  
25 the answers, we're going to strike them, and

1 sustain the objection. Do you have any other  
2 questions?

3 MR. GALATI: No, I don't have any other  
4 questions. We'll bring our panel back tomorrow.  
5 Well, it won't be Rosedale-Rio Bravo, but Buena  
6 Vista.

7 HEARING OFFICER GEFTER: You'll bring  
8 other witnesses on the water issue tomorrow?

9 MR. GALATI: Correct.

10 HEARING OFFICER GEFTER: Okay. I  
11 understand that there are some public comments  
12 that the Public Advisor would like to offer into  
13 the record regarding topics that we discussed this  
14 morning. So why don't we allow that to occur  
15 right now before we end the hearing. Ms.  
16 Mendonca? -- and bring the mike to you.

17 MS. MENDONCA: Yes. Thank you very  
18 much. Marianne Griffith had been attending and  
19 went through this morning, and was sorry she was  
20 unable to stay and make this comment. She has  
21 several.

22 She's concerned about the devaluation of  
23 land, and she's not speaking about her residence.  
24 She says "we have approximately 400 acres directly  
25 east of the proposed site. But with the

1 prevailing winds blowing in that direction and the  
2 pollution settling on our property, who would want  
3 to purchase this property?"

4 "What will happen to our commercial  
5 cattle after consuming these pollutants in their  
6 feed or water, which is pumped naturally from  
7 Midway Creek? Will none of the pollutants affect  
8 them? And just how many months or years will the  
9 testing take before we know the effect on our  
10 cattle or our agricultural crops? Our land value  
11 will be sorely affected by this plant."

12 And about traffic she says "at commuter  
13 times, which is between 4:30 to 8:00 a.m. and 3:00  
14 to 6:30 p.m. the traffic on Midway/Patterson Pass  
15 Roads is nonstop. The drivers drive recklessly,  
16 speed, and pass over quadruple yellow lines. How  
17 will the new traffic affect this already existing  
18 problem?"

19 And she has two additional comments.  
20 She's worried about construction dust and she's  
21 worried about air quality.

22 HEARING OFFICER GEFTER: Okay. We'll do  
23 that when we get to the air quality and public  
24 health section.

25 MS. MENDONCA: The construction dust --



1     you want to postpone that?

2                 HEARING OFFICER GEFTER:   Yes.   And I  
3     have a question for staff, whether the questions  
4     raised by Ms. Griffith with respect to traffic  
5     have been addressed in the traffic analysis?

6                 MS. HOUCK:   I do not have a witness  
7     available on the traffic and transportation  
8     section.   I can ask staff to review those comments  
9     and submit that information to the Committee with  
10    the revised conditions.

11                MR. SARVEY:   Can I offer an exhibit in  
12    relation to the traffic issue?

13                HEARING OFFICER GEFTER:   No, we're not  
14    taking exhibits right now.   We're taking public  
15    comment.

16                MR. SARVEY:   Well, it's related to the  
17    public comment -- okay, we'll put it on hold.

18                MS. MENDONCA:   Okay.   What I will do  
19    then is I also have comments from Eugene Sparks on  
20    air quality, and I will bring those to the meeting  
21    on the 18th.

22                HEARING OFFICER GEFTER:   Yes.

23                MS. MENDONCA:   Meanwhile I will docket  
24    all of these.

25                HEARING OFFICER GEFTER:   Thank you very

1 much. Off the record.

2 (Off the record.)

3 HEARING OFFICER GEFTER: Back on the  
4 record. Tomorrow we're going to, at the  
5 conclusion of taking testimony on water issues,  
6 with the exception of testimony on the shrew, and  
7 the impacts on the shrew. And we will do that  
8 tomorrow, continue our hearings.

9 At the conclusion of tomorrow we will go  
10 over the exhibits that still need to be submitted,  
11 and the other topics that are remaining open. And  
12 we'll go over the times that the Committee has  
13 requested from the parties at that time.

14 We had also, the Intervenor, I guess  
15 Mike Boyd for CARE, had indicated that he had a  
16 witness on water -- that was Mr. Powers, who filed  
17 some written testimony on dry cooling. Mr. Powers  
18 was unable to be here today to testify on his dry  
19 cooling proposal, and so the Intervenor wishes to  
20 offer that exhibit into the record by declaration.

21 And my question is whether either the  
22 Applicant or the staff wishes to cross-examine Mr.  
23 Powers on declaration. And he would be available  
24 on the 18th.

25 MR. GALATI: I now need to, based on

1     what has happened today and based on the workshop,  
2     I need to look at that exhibit to see if I have  
3     any cross-examination. I had none, but I may have  
4     cross-examination. I can't answer today, but I --

5             HEARING OFFICER GEFTER: Can you tell us  
6     about it tomorrow?

7             MR. GALATI: I will tell about it  
8     tomorrow, and I will e-mail Mr. Boyd, who won't be  
9     here tomorrow, to let him know whether or not.

10            MR. BOYD: Does that prevent me from  
11     letting me put it in to the record, filing it?

12            HEARING OFFICER GEFTER: You can offer  
13     it into the record tonight, and it would be  
14     subject to cross-examination if Mr. Galati or Ms.  
15     Houck have any questions.

16            MR. BOYD: Right. And he's available on  
17     the 18th if need be.

18            HEARING OFFICER GEFTER: Yes, we know  
19     that. So do you want to move that into the  
20     record? I think it already has an exhibit number.

21            MR. BOYD: Yes it does. Hold on a  
22     second I've got to find it here -- it was exhibit  
23     104. And I would move that that would be moved  
24     into the record, if there's no objections.

25            HEARING OFFICER GEFTER: Yes, exhibit

1 104 will be moved into the record. That is the  
2 testimony of Mr. Bill Powers on the topic of water  
3 resources and his proposal for dry cooling. It  
4 will be subject to cross-examination if Mr. Galati  
5 or Ms. Houck indicate to us that they wish to  
6 cross-examine on that particular testimony.

7 And we would schedule that on the 18th  
8 or at a different date if necessary. Okay, thank  
9 you.

10 MR. GALATI: No objection.

11 HEARING OFFICER GEFTER: At this point,  
12 do you have any questions? Then the hearing is  
13 adjourned for the evening.

14 (Off the record.)

15 HEARING OFFICER GEFTER: Back on the  
16 record. I have one more item that we need to  
17 address. That originally we scheduled testimony  
18 on the Intervenor CARE's direct testimony on air  
19 quality, and the witness was Mr. Bob Sarvey.

20 Mr. Sarvey is willing to testify on the  
21 18th, or at least put, you know, put in his  
22 comments on air quality. Mr. Boyd won't be  
23 available the 18th, but he is offering to withdraw  
24 his request to put on the direct testimony  
25 tomorrow.

1           And instead we're going to take water  
2 tomorrow. Okay, now the hearing is adjourned for  
3 the evening.  
4 (Thereupon, at 7:04 p.m., the hearing was  
5 adjourned.)

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## CERTIFICATE OF REPORTER

I, JAMES RAMOS, an Electronic Reporter,  
do hereby certify that I am a disinterested person  
herein; that I recorded the foregoing California  
Energy Commission Hearing; that it was there after  
transcribed into typewriting.

I further certify that I am not of  
counsel or attorney for any of the parties to said  
workshop, nor in any way interested in outcome of  
said workshop.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 22nd day of September, 2003.

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